

February 2012

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### Recommended Citation

Waller, Spencer Weber (2004) "The Antitrust Legacy of Thurman Arnold," *St. John's Law Review*: Vol. 78 : No. 3 , Article 9.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol78/iss3/9>

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# THE ANTITRUST LEGACY OF THURMAN ARNOLD

SPENCER WEBER WALLER†

## INTRODUCTION

No one will ever know exactly why Franklin Roosevelt hired Thurman Arnold as head of the Antitrust Division of the Justice Department in 1938. It may simply have been that head of the Antitrust Division was the first important administration job available when Arnold's supporters and friends sought a full-time Washington position for him.<sup>1</sup> While the nomination proved to be an awkward and controversial choice, it was also an inspired choice. For the next five years, Thurman Arnold revitalized antitrust law and enforcement and changed the entire focus of the New Deal from corporatist planning to competition as the fundamental economic policy of the Roosevelt administration. Those who favor a consumer-friendly competitive economy owe him a debt that transcends the specific cases he brought and the doctrines he espoused. This Article is a look at that legacy.

## I. THE NEW DEAL AND ANTITRUST

Although always part of the so-called Roosevelt brain trust, Arnold personally had little interaction with Roosevelt. Their only contact consisted of a single half-hour meeting while Arnold was on loan from the Tax Division of the Justice Department to assist the Treasury Department with the preparation of hearings

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<sup>1</sup> See ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 111 (1995); Wilson D. Miscamble, *Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal*, 56 BUS. HIST. REV. 1, 5, 6-7 (1982).

on tax evasion by the rich.<sup>2</sup> Roosevelt admitted he had not read Arnold's best seller, *The Folklore of Capitalism*, which lambasted antitrust, when he nominated Arnold to head the Antitrust Division.<sup>3</sup> In general, Roosevelt paid little attention to antitrust over the years.<sup>4</sup> The President presided over a brain trust that included such diverse personalities as Felix Frankfurter, Rexford Tugwell, Adolph Berle, Henry Wallace, Donald Richberg, Robert Jackson, Jerome Frank, Herman Oliphant, and Arnold, each of whom held contrasting views on the relative importance and effectiveness of competition enforcement versus planning in curing the country's ills. For most of the group, including Arnold prior to 1938, antitrust and economic competition were never the preeminent tools to combat the Great Depression.<sup>5</sup> No one in the Roosevelt inner circle really knew if the President had a fundamental predisposition one way or another, but it was unlikely that he was a committed trustbuster.<sup>6</sup>

As Robert Jackson commented in his memoir of the New Deal, "[FDR] knew that there were evils in the suppression of competition and that there were evils in competition itself, and where the greater evils were he never fully decided."<sup>7</sup>

The entire history of the New Deal and competition was a contradiction.<sup>8</sup> It had been preceded by the experience of war

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<sup>2</sup> See Letter from Thurman Arnold, Assistant Attorney General, to Mr. and Mrs. C.P. Arnold (July 1, 1937), in *VOLTAIRE AND THE COWBOY: THE CORRESPONDENCE OF THURMAN ARNOLD* 255, 257 (Eugene Gressley ed., 1977) [hereinafter *VOLTAIRE AND THE COWBOY*].

<sup>3</sup> See *Inquiry on Arnold Planned by Borah*, N.Y. TIMES, Mar. 9, 1938, at 5.

<sup>4</sup> For example, in his 1933 book, *Looking Forward*, President Roosevelt devoted all of one brief historical paragraph to the topic of antitrust. FRANKLIN D. ROOSEVELT, *LOOKING FORWARD* 26 (1933).

<sup>5</sup> See BERNARD STERNESHER, *REXFORD TUGWELL AND THE NEW DEAL* 342-43 (1964).

<sup>6</sup> See, e.g., ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 123-24 (Fordham Univ. Press 1995) (1966); REXFORD G. TUGWELL, *THE DEMOCRATIC ROOSEVELT* 563 (1957); Miscamble, *supra* note 1, at 5; Raymond Moley, *Roosevelt's Refusal to Make a Choice*, in *NEW DEAL THOUGHT* 135 (Howard Zinn ed., 1966).

<sup>7</sup> ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 124 (John Q. Barrett ed., 2003).

<sup>8</sup> See HAWLEY, *supra* note 6 (discussing the conflicting policies of the New Deal); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940*, at 56-60, 64-70, 163-65, 248-49, 258 (Gary Steele Commager & Richard B. Morris eds., 1963) (describing Roosevelt's contradictory policy). Even after the fall of the National Recovery Administration, the planning wing of the New Deal remained a potent force within the administration in constant tension

mobilization during World War I, where industry cooperated with government and colluded under the direction of Bernard Baruch and his War Industries Board. The era of associationalism followed in the 1920s, when the antitrust laws were sporadically enforced and key government officials, up to and including President Hoover, preferred industry cooperation to the robust competition mandated by the antitrust laws.<sup>9</sup> Throughout the early New Deal period, the antitrust laws were, at best, one minor federal policy among many. For some key New Dealers, competition New Dealers posed a threat to prosperity and needed to be replaced by some form of business-government cooperation and economic planning.<sup>10</sup>

The first half of the New Deal focused on the National Industrial Recovery Act (NIRA), the Agricultural Adjustment Administration (AAA), and the promulgation of industry codes, which were the antithesis of the free market competition protected by the antitrust laws.<sup>11</sup> Industry, with minimal government supervision, drafted codes of fair competition with only limited input from labor and consumers. The codes were intended to be legally enforceable against the entire industry, regardless of whether a party participated in the drafting or agreed to be bound. Most codes directly or indirectly sought to control prices, prevent price discounting, legalize open price systems, limit production, and standardize terms of sale to

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with the antimonopoly proponents. See generally BRINKLEY, *supra* note 1 (explaining how the New Deal was refined).

<sup>9</sup> See generally CHARLES R. GEISST, *MONOPOLIES IN AMERICA* 92–103 (2000) (explaining how the 1920s were years full of contradiction); ELLIS W. HAWLEY, *THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER* 53 (1979) (“[B]usiness organizers were able to erect shields against their antagonists and preserve much of what the war had brought about.”); HAWLEY, *supra* note 6, at 10–11, 37–38 (discussing the anti-competitive policies of the 1920s); RULDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA* 76–78 (rev. ed. 1996) (describing the 1920s as an era of cooperation); Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, 16 *ANTITRUST* 71 (2002).

<sup>10</sup> For example, even during the 1932 campaign, key Roosevelt advisors such as Rexford Tugwell and Adolph Berle believed that free market competition was impossible; they believed it to be a cause of, rather than a solution to, the Depression. See LEUCHTENBURG, *supra* note 8, at 34–35.

<sup>11</sup> See GEISST, *supra* note 9, at 140–43; HAWLEY, *supra* note 6, at 19–148; CHARLES F. ROOS, *NRA ECONOMIC PLANNING* (De Capo Press 1971) (1937). The NRA contained its own contradictions and in some ways was merely a continuation of the battle between those who favored industrial self-government, national economic planning, and competition enforced through the antitrust laws. HAWLEY, *supra* note 6, at 51.

minimize non-price competition.<sup>12</sup> As the distinguished historian of the New Deal, Ellis Hawley, concluded: "By and large . . . the codes reflected the desires of businessmen to [create] economic cartels that could check the forces of deflation."<sup>13</sup> The antitrust laws were repealed except for vague and virtually unenforced provisions prohibiting "monopolies or monopolistic practices."<sup>14</sup> Under these provisions, the courts could enjoin sales at less than the code price and subject violators to significant penalties. Adlai Stevenson, who was briefly a lawyer with the AAA noted: "in essence, we're really creating gigantic trusts in all the food industries."<sup>15</sup> It was even the era where the popular board game "Monopoly" was first introduced.

The goal of the NIRA was to restrict production, raise price, create profits, and restart business investment. Not surprisingly, to the extent prices were increased, the increase further limited production, employment, and the purchasing power of consumers—leaving the country in even worse straits than at the beginning of the Great Depression. Over time, consumer interests, labor groups, smaller producers, anti-trusters, and government purchasers became increasingly concerned with higher prices and began to vocally oppose the National Recovery Administration (NRA) and its codes.<sup>16</sup>

Throughout this period, the Antitrust Division had been a backwater of the Justice Department. Formed as a separate division of the Justice Department in 1933,<sup>17</sup> it perversely spent its early years enforcing the industry price-fixing codes of the NIRA and the AAA and representing a hodgepodge of federal agencies and departments in appellate matters.<sup>18</sup>

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<sup>12</sup> See HAWLEY, *supra* note 6, at 57–60; PETER H. IRONS, *THE NEW DEAL LAWYERS* 33 (1982).

<sup>13</sup> HAWLEY, *supra* note 6, at 136.

<sup>14</sup> *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 521 (1935) (quoting 15 U.S.C. § 703(a) (2000)).

<sup>15</sup> 8 *THE PAPERS OF ADLAI E. STEVENSON* 267, 269 (Walter Johnson ed., 1979).

<sup>16</sup> See HAWLEY, *supra* note 6, at 72–90. Many felt that the NRA policies "virtually eliminated price competition." *Id.* at 361. For example, Harold Ickes, Secretary of the Interior and head of the Public Works Administration during the NRA period, complained that between June of 1935 and March of 1936, his agency received identical bids on government projects 257 times. *Id.*

<sup>17</sup> See generally Symposium, *In Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division*, 39 ANTITRUST BULL. 813 (1994) (providing an overview of the formation of the Antitrust Division).

<sup>18</sup> See IRONS, *supra* note 12, at 35–57, 133–55.

Those few true antitrust cases it brought often ended in disaster. In the 1934 landmark case *Appalachian Coals Inc. v. United States*,<sup>19</sup> the Supreme Court refused to outlaw a joint selling arrangement in the coal industry, despite past precedent that all price fixing arrangements were per se illegal.<sup>20</sup>

After the Supreme Court declared the NIRA unconstitutional in the 1935 case *A.L.A. Schechter Poultry Corp. v. United States*,<sup>21</sup> Roosevelt showed renewed interest in favoring antitrust enforcement and competition over planning. Clearly some new policy initiatives were necessary. The recession of 1937 was a shock to the nation and a threat to the political health of the New Deal, already suffering from the defeat of the infamous Court-packing plan and the proposed reorganization of the executive branch.<sup>22</sup> Arnold attributed this change to Roosevelt's pragmatism in searching for new ways to end the Depression regardless of philosophical consistency.<sup>23</sup>

However, change was slow in coming. References to the importance of antitrust began to appear in Roosevelt's public pronouncements.<sup>24</sup> Key New Dealers such as Harold Ickes and Robert Jackson gave fiery speeches on the dangers of monopolies.<sup>25</sup> Yet the President followed these initiatives with a message to Congress including a renewed call for greater cooperation between government and business.

The Antitrust Division did revive somewhat under the leadership of Robert Jackson from 1937 to 1938, bringing important cases in the auto, oil, and aluminum industries.<sup>26</sup> But it simply had too much to do and too few resources. In addition to investigating hundreds of complaints of monopoly and restraint of trade, the Antitrust Division also defended or enforced the orders of administrative agencies including the Interstate Commerce Commission (ICC), Federal Trade

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<sup>19</sup> 288 U.S. 344 (1933).

<sup>20</sup> *Id.* at 346 (concluding that there was no unlawful purpose to restrain or to monopolize commerce).

<sup>21</sup> 295 U.S. 495, 542 (1935).

<sup>22</sup> See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 659 (1987).

<sup>23</sup> THURMAN ARNOLD, *FAIR FIGHTS AND FOUL* 146 (1965).

<sup>24</sup> See 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 129 (Samuel I. Rosenman ed., 1969).

<sup>25</sup> See, e.g., BRINKLEY, *supra* note 1, at 56-57; HAWLEY, *supra* note 6, at 392-93.

<sup>26</sup> See HAWLEY, *supra* note 6, at 374-76.

Commission (FTC), and Federal Communications Commission (FCC). Even the defenses of labor and agricultural regulations were normally referred to the now badly misnamed and undermanned Antitrust Division.<sup>27</sup>

## II. A CONTROVERSIAL NOMINEE

The Washington pundits viewed the Arnold nomination as part of the continuing struggle between the economic planners and the antimonopoly forces within the administration. In particular, Arnold's nomination to head the Antitrust Division was seen as a loss for Attorney General Homer Cummings, who, although friendly with Arnold, wanted a more conservative successor to Jackson, who was moving on to become Solicitor General. A column in the *Washington Star* described Arnold as the fourth choice in a contest over the direction of antitrust policy.<sup>28</sup>

Arnold's nomination also came at a time when the Senate was feeling buffaloeed by Roosevelt in a series of key controversial nominations, including Hugo Black and Stanley Reed to the Supreme Court and Robert Jackson to the post of Solicitor General. Most viewed the nomination as particularly auspicious for Arnold as following in the paths of Jackson and Stanley Reed toward eventual promotion to Solicitor General, Attorney General, and perhaps the Supreme Court.

Many in the press attacked Arnold as a radical and a professional smart aleck.<sup>29</sup> Other papers weighed in by describing him as a "Foe of Capitalists," a "Left Wing New Dealer" and a "Capitalist critic."<sup>30</sup> Most papers pointed out the irony in his selection, but the *Philadelphia Record* more accurately noted that, although personally an opponent of prohibition, Arnold had also produced the driest administration possible as mayor of Laramie.<sup>31</sup> The *Baltimore Sun* wrote: "Now that he is going to be put in charge of this huge joke, it will be

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<sup>27</sup> SELECTED PAPERS OF HOMER CUMMINGS 17 (Carl Brent Swisher ed., De Capo Press 1972) (1939).

<sup>28</sup> Joseph Alsop & Robert Kintner, *The Capital Parade, Cummings Seen Losing Control of Justice Agency*, WASH. STAR, Mar. 9, 1938.

<sup>29</sup> See, e.g., WORLD TELEGRAM (N.Y.), Mar. 8, 1938; MONITOR (Concord, N.H.), Mar. 8, 1938.

<sup>30</sup> See, e.g., HERALD (D.C.), Mar. 6, 1938; PHILA. REC., Mar. 6, 1938.

<sup>31</sup> See, e.g., PHILA. REC., Mar 7, 1938.

interesting to see whether he continues to laugh or whether he suddenly decides to take it seriously.”<sup>32</sup>

Arnold was quite uneasy about the upcoming hearings, although Senator Joseph O'Mahoney of Wyoming, a strong supporter and friend of Arnold, was the chair of the Senate subcommittee handling the nomination. Senators King of Utah and Burke of Nebraska, both conservative Democrats, promised to closely investigate Arnold's background because, in their view, too many men with a socialist taint were already in the administration. Senator Borah, the great Republican populist of Idaho, was concerned with both the substance of Arnold's views on antitrust expressed in *The Folklore of Capitalism*, as well as Arnold's completely gratuitous personal attack on him by name for trust-busting crusades, which were “entirely futile but enormously picturesque and which paid big dividends in terms of personal prestige.”<sup>33</sup> There was a second surge in book sales for *The Folklore of Capitalism* as the press, the senators, their staff, and the public scrambled to see what Arnold had actually said.<sup>34</sup>

Before the hearing, Arnold wrote to his parents:

I go on before the Senate Judiciary sub-committee tomorrow, who have been taking sentences out of context of my book to throw at me—at least this is the rumor. I am caught between the conservatives who are afraid I am tougher than Jackson and the liberals who think my book is a satire on antitrust laws. The New York Times and New York Sun have urged that I be thoroughly investigated because I am a sarcastic joker not fit for solemn duties.<sup>35</sup>

Thus, everyone predicted a lively and exciting hearing in the Senate.

On Friday March 11, 1938, in front of a full gallery, the subcommittee approved Arnold's nomination by a 4-0 vote after

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<sup>32</sup> BALT. SUN, Mar. 7, 1938.

<sup>33</sup> THURMAN ARNOLD, *THE FOLKLORE OF CAPITALISM* 217 (1937). After confirmation, Arnold in fact apologized to Borah for this passage. See Letter from Thurman W. Arnold to William Borah (Mar. 16, 1938), in *VOLTAIRE AND THE COWBOY*, *supra* note 2, at 268.

<sup>34</sup> *The Folklore of Capitalism* was even eventually placed on a list of one hundred recommended books for young naval officers. See Thurman W. Arnold, *Tugwell Required Reading for Navy*, WASH. POST, Oct. 25, 1938, at 1.

<sup>35</sup> Letter from Thurman W. Arnold to Mr. And Mrs. C.P. Arnold (undated) (on file with American Heritage Center, University of Wyoming, C.P. Arnold Papers, 1841–1943, box 45).



forty-five minutes of questioning almost entirely by Borah.<sup>36</sup> O'Mahoney lobbed a few softball questions so that Arnold could affirm his belief in capitalism. When prompted, Arnold duly professed his faith in capitalism and support for antitrust policies, arguing that antitrust enforcement needed to be improved. In response to sharper questioning by Borah, Arnold claimed that his book was merely a diagnosis and not a prescription for remedy.<sup>37</sup> Max Lerner later wrote:

One who reads the account of the Arnold-Borah encounter in the committee room cannot but feel that the temper of Arnold's replies to Borah was not quite the temper of the book. There was more restraint in it, less joyousness, less certitude, less of the sharp quality of the dissecting room.<sup>38</sup>

His testimony appears persuasive, regardless of whether it was entirely consistent with his personal beliefs or his writings.

When it came time for the subcommittee to vote, Borah on the left and King on the right withheld their votes,<sup>39</sup> confirming Arnold's earlier concerns that he would be attacked from both sides. Borah claimed there were other matters about Arnold he wished to investigate before the matter came before the full Senate.

After Arnold's performance in the subcommittee, quick approval by the Judiciary Committee and the full Senate was assured. The full Judiciary Committee recommended Arnold for the post on March 14, 1938 despite Senator King's statement that Arnold was "not qualified."<sup>40</sup> There was no recorded vote, but three to four committee members were rumored to have opposed the nomination.<sup>41</sup> Unlike the stormy debate and vote over Robert Jackson's nomination, the full Senate confirmed without a recorded vote on March 16, 1938 "amidst confusion preceding recess."<sup>42</sup>

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<sup>36</sup> *Nomination of Thurman W. Arnold: Hearings Before Subcomm. of the Senate Comm. on the Judiciary*, 75th Cong. 2-11 (1938).

<sup>37</sup> See, ARNOLD, *supra* note 33, at 141.

<sup>38</sup> Max Lerner, *The Shadow World of Thurman Arnold*, 47 YALE L.J. 687, 701 (1938). For Lerner, this wasn't necessarily a bad thing—the moral of the story was "that you don't take your dissecting instruments into the Senate chamber." *Id.*

<sup>39</sup> See *Arnold Approved by Sub-Committee*, N.Y. TIMES, Mar. 12, 1938, at A17.

<sup>40</sup> *Yale Professor is Nominated to Jackson's Post*, WASH. POST, Mar. 9, 1938, at X9 (discussing King's statements berating Arnold's qualifications).

<sup>41</sup> See *Senators Report Arnold: But 3 or 4 Vote No On Nominee for Solicitor General*, N.Y. TIMES, Mar. 15, 1938, at A12.

<sup>42</sup> WASH. HERALD, Mar. 16, 1938.

Arnold was sworn in on March 21, 1938. At his initial press conference, he appeared ill at ease, sitting at Jackson's former desk, with his pipe clenched in his teeth, and his hands alternately hooked in his vest or folded across his ample stomach.<sup>43</sup> He was said to resemble a "slightly paunchy version" of the actor Ronald Colman.<sup>44</sup>

Arnold began blandly enough with a prepared statement:

[All I can say at this time is that I intend to] pursue a policy of enforcement of the anti-trust laws which will be both fair and vigorous.

....

I have just arrived [in Washington] and as yet I have not had [the] opportunity to acquaint myself with the various complicated matters now pending . . . therefore, in fairness to my colleagues and to my chief, I must restrict myself to this general statement. The only specific thing I can say now is that I am ready to go to work.<sup>45</sup>

### III. THE TASK AHEAD

Arnold had a profoundly difficult task ahead of him. Throughout the 1920s, the antitrust laws were barely enforced, if at all.<sup>46</sup> Competition law was all but abandoned during the NRA in favor of industry codes which allowed for price competition and unfair practice to be stamped out by the government and the courts. Even after the formal demise of the NRA in the courts, many industries continued to adhere to informal codes of fair competition—illegal price fixing or cartels in another era—with the acquiescence or even informal support of key New Deal officials.<sup>47</sup>

Arnold was aware of the enormity of his task and his reputation as a smart-aleck opponent of the value of antitrust itself. Arnold always viewed the latter as somewhat undeserved.

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<sup>43</sup> HARTFORD TIMES, Mar. 23, 1938.

<sup>44</sup> BRINKLEY, *supra* note 1, at 118 (stating that he had slicked back hair, a thin mustache and wore dark, double-breasted suits).

<sup>45</sup> *Arnold Takes Office as Anti-Trust Chief*, N.Y. TIMES, Mar. 22, 1938, at A3 (quoting Arnold).

<sup>46</sup> See generally PERITZ, *supra* note 9, at 75–89 (discussing the courts' reluctance to implement anti-trust laws through cases in the 1920s).

<sup>47</sup> See HAWLEY, *supra* note 6, at 166–68 (demonstrating tendency to draft proposals similar to those made during the days of the NRA).

In his autobiography, he noted that he supported price controls and production quotas in agriculture because competition failed to either help the farmer or provide adequate food production for the nation.<sup>48</sup> He said he felt differently about the NRA since business would bounce back and, therefore, did not need additional help by restricting production.<sup>49</sup>

In one important way, Arnold was helped immeasurably by the non-enforcement of the prior decade. Because of the limited enforcement activity in the 1920s, the virtual repeal of antitrust during the NRA, and the continued support from the administration for industry coordination even after the formal demise of the NRA in the courts, few in the business community felt the need to conceal their anticompetitive activities. There was much low-hanging fruit to be plucked by the Antitrust Division, but Arnold needed a way to ensure that the President and the public supported the renewed enforcement of the antitrust laws and that the remaining foes of antitrust within the New Deal were shunted to the sidelines of the debate and prevented from active interference. Arnold, not surprisingly, saw his task in symbolic and institutional terms and not only in terms of the merits of the individual antitrust case. He wrote, "I believed that my principal function was to convince American businessmen that the Sherman Act represented something more than a pious platitude; second, that its enforcement was an important economic policy."<sup>50</sup>

During this brief interlude, which historian Alan Brinkley has referred to as the "Anti-Monopoly Moment,"<sup>51</sup> Arnold seized on the image of antitrust as the non-partisan traffic cop, the "cop on the beat," or as the "referee" of the competitive process, as a way to create a viable program of antitrust enforcement with broad public support.<sup>52</sup> This was a deliberate choice by Arnold

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<sup>48</sup> See ARNOLD, *supra* note 23, at 133.

<sup>49</sup> *Id.*

<sup>50</sup> See *id.* at 113.

<sup>51</sup> See generally BRINKLEY, *supra* note 1, at 106-36 (discussing the movement).

<sup>52</sup> See THURMAN W. ARNOLD, THE BOTTLENECKS OF BUSINESS 122, 202, 211-12 (1940); Thurman Arnold, *Address at Banquet*, 9 MISS. B.J. 219, 223 (1938) [hereinafter Arnold, *Address at Banquet*]; Thurman Arnold, *Antitrust Law Enforcement, Past and Future*, 7 LAW & CONTEMP. PROBS. 5, 12 (1940) [hereinafter Arnold, *Antitrust Law Enforcement*]; Thurman W. Arnold, *Feathers and Prices*, 8 COMMON SENSE 3, 5 (1939) [hereinafter Arnold, *Feathers and Prices*]; Thurman Arnold, *What Can Government Offer—What can Business Expect?*, 5 VITAL SPEECHES 525, 526 (1939) [hereinafter Arnold, *What Can Government Offer*];

who, while a law professor at Yale, had written so eloquently about the symbolism of "law enforcement" and the distinctions in the public mind between courts and bureaucracies as decision-makers.<sup>53</sup> As he explained in a letter to an acquaintance: "My belief is that the only instrument which has a chance to preserve competition in America is antitrust enforcement through the courts. Traditionally we accept the courts as an institution which cannot be criticized or badgered as we badger an administrative bureau."<sup>54</sup>

Arnold went out of his way to distinguish antitrust enforcement from either "regulation" or the kind of emergency legislation experimented with in the NRA.<sup>55</sup> Arnold praised the use of a case-by-case method in the federal courts as the proper way to make antitrust policy, instead of the creation of new agencies or bureaucracies.<sup>56</sup> He elevated public, rather than private, enforcement of the Sherman Act as the critical policy tool.<sup>57</sup> He conceptualized both cartels and monopolies as "bottlenecks" on production and distribution, which kept the industrial production of America from reaching the consumer, and continued the now seemingly endless Depression through artificial and private arrangements.<sup>58</sup> He wrote: "The four horsemen—fixed prices, low turnover, restricted production, and monopoly control—rode through our economy from factory to

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Thurman Arnold, *An Inquiry into the Monopoly Issue*, N.Y. TIMES, Aug. 21, 1938, § 7, at 1, 14; Thurman Arnold, *Labor's Hidden Holdup Men*, READER'S DIG., June 2, 1941, at 136, 139–40 [hereinafter Arnold, *Labor's Hidden Holdup Men*]; N.Y. Sun Aug. 9, 1940.

<sup>53</sup> See THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 149–71, 199–228 (First Harbinger Books 1962) (1935).

<sup>54</sup> Letter from Thurman W. Arnold, Assistant Attorney General, to Dexter M. Keezer (Aug. 1, 1947) (on file with American Heritage Center, University of Wyoming, Thurman Wesley Arnold Papers, 1891–1969, box 37, file 4).

<sup>55</sup> See ARNOLD, *supra* note 52, at 107 (stating that "[The Sherman Act] is aimed to prevent one thing, and one thing only – the private seizure of power over interstate commerce"); Arnold, *Antitrust Law Enforcement*, *supra* note 52, at 14.

<sup>56</sup> See ARNOLD, *supra* note 52, at 103–07; Thurman W. Arnold, *Consent Decrees and the Sherman Act*, WORLD CONVENTION DATES, June 1939, at 12 [hereinafter, Arnold, *Consent Decrees*]; Letter from Thurman W. Arnold to William L. Chenery, Editor, *Colliers Magazine* (May 5, 1939), in VOLTAIRE AND THE COWBOY, *supra* note 2, at 284–85.

<sup>57</sup> See ARNOLD, *supra* note 52, at 164–89 (discussing and criticizing the problems that occurred with predominately private enforcement).

<sup>58</sup> See THURMAN ARNOLD, *ANTITRUST DIV., REPORT OF ASSISTANT ATTORNEY GENERAL*, 1–2 (1939) [hereinafter ARNOLD, *REPORT*]; ARNOLD, *supra* note 52, at 1–19; Arnold, *Address at Banquet*, *supra* note 52, at 220–21.

farm.”<sup>59</sup> He advocated the proper mission of the Antitrust Division as that of a prosecutor using the courts rather than agencies to make law, but one not hostile to large business, only the abuse of power, and one that operated as an expert body largely independent of politics.<sup>60</sup> As a means to show he was neither opposed to size alone nor anti-business, Arnold cleverly praised Henry Ford as an innovative businessman beset by combinations of competitors—and later suppliers—intent on blocking him from producing cheaper and higher quality automobiles for consumers.<sup>61</sup> He argued that vigorous antitrust enforcement was even good for a balanced budget, returning far more in fines than it costs to run the entire Antitrust Division.<sup>62</sup>

Always conscious of symbols, Arnold even bought himself a 1927 square topped coupe automobile of “ancient vintage” with high wooden spoked wheels for \$45 at a time when he was making \$9000. In 1942, when the rear end of that car dropped off, he sold it for \$5 and replaced it with an equally ancient 1930 LaSalle.<sup>63</sup>

Arnold discontinued the former occasional practice of using the threat of criminal prosecution to leverage defendants into negotiating a civil consent decree to avoid a trial and accept meaningless symbolic equitable relief.<sup>64</sup> Consent decrees were limited to situations where defendants proposed industry-wide relief that fully restored competition beyond what could be achieved through a successful prosecution or civil action by the government and the defendants permitted meaningful

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<sup>59</sup> Thurman W. Arnold, *Cartels Threaten Democracy*, 1944 SCI. DIG. 78, 80.

<sup>60</sup> See ARNOLD, REPORT, *supra* note 58, at 6–7; ARNOLD, *supra* note 52, at 97, 134–35, 191, 272–73; Letter from Thurman W. Arnold to Arthur Sulzberger (Aug. 25, 1939), in VOLTAIRE AND THE COWBOY, *supra* note 2, at 291; Letter from Thurman W. Arnold to Frank Knox (July 6, 1939), in VOLTAIRE AND THE COWBOY, *supra* note 2, at 286; Letter from Thurman W. Arnold to Helen Rogers Reid (Dec. 2, 1938), in VOLTAIRE AND THE COWBOY, *supra* note 2, at 278–79; Letter from Thurman W. Arnold to Robert H. Jackson (Sept. 2, 1942), in VOLTAIRE AND THE COWBOY, *supra* note 2, at 330.

<sup>61</sup> See ARNOLD, *supra* note 52, at 119–21.

<sup>62</sup> *Id.* at 122.

<sup>63</sup> Richard Lee Strout, *The Folklore of Thurman Arnold*, NEW REPUBLIC, Apr. 27, 1942, at 570.

<sup>64</sup> See ARNOLD, *supra* note 52, at 165–89; Arnold, *Consent Decrees*, *supra* note 56, at 12. Nonetheless, Arnold's own use of consent decrees was attacked as making him the autocratic one-man regulator of the American economy. See ARNOLD, *supra* note 52, at 156–58 (reprinting critical cartoon).

monitoring by the government.<sup>65</sup> He also instituted a policy by which businesses interested in ascertaining the legality of future action could seek the opinion of the Antitrust Division regarding its enforcement intentions toward the proposed conduct. In return, the business could count on not being charged criminally, even if the government ultimately opposed the conduct.<sup>66</sup>

Arnold believed that the only thing that would make businessmen behave was the threat of indictment. When he brought a case, he would indict the individual defendants and fingerprint them like ordinary criminals. He shrewdly observed how even the mere bringing of an indictment usually lowered prices and ended the alleged anticompetitive practices harming the public.<sup>67</sup>

Arnold was relentless in promoting himself, his vision for antitrust, the work of the Antitrust Division, and the need for ever greater resources, staffing, and budgets. He lobbied for competition policy and resources with Capitol Hill and the executive branch. He assiduously cultivated the press, spoke directly to the public, and continued to produce an astonishing stream of books, articles, and speeches—all while supervising and inspiring the Antitrust Division to new heights of activity. For example, in one of his earliest initiatives, he began a new policy of issuing extensive publicity with each prosecution in order to educate the public and provide guidance to the business community by setting forth the practices challenged and why the government thought there was an antitrust violation.<sup>68</sup>

Arnold used symbols and imagery repeatedly to justify the mission of the Antitrust Division to Congress. He was spectacularly successful, vastly increasing the size and budget of the Antitrust Division. As Senator McCarran noted, on one occasion Arnold both defeated an attempt to cut his budget and emerged with an increase of \$750,000: "He is the best salesman I ever listened to in all my life. He can come to the United States

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<sup>65</sup> See ARNOLD, *supra* note 52, at 141–44, 152–63. Arnold also left open the door to the exceptional circumstance where a consent decree was necessary to implement some innovative business arrangements without fear of government challenge. See *id.* at 152–54.

<sup>66</sup> See *id.* at 144–52.

<sup>67</sup> Interview with Victor Kramer, Retired Litigator, Antitrust Division, in Washington D.C. (July 2, 2002).

<sup>68</sup> See Thurman W. Arnold, *Prosecution Policy Under the Sherman Act*, 24 A.B.A. J. 417 (1938).

Senate to sell a red-hot stove and make you think it is a refrigerator."<sup>69</sup> By the end of his tenure, commentators ranked Arnold and J. Edgar Hoover as both the most popular New Deal figures and its biggest *prima donnas*.<sup>70</sup>

From the moment Arnold entered office, he lobbied in speeches, broadcasts, articles, and books to increase the size and budget of the Antitrust Division, often comparing the Division to the Securities & Exchange Commission (SEC), which had over 1200 personnel, and to the Civil Aeronautics Board, which had a staff of over 2800.<sup>71</sup> While he never achieved those lofty targets, he did more than anyone would have expected. From 1933 until Arnold left the Justice Department in 1943, the number of Antitrust Division employees grew from eighteen to nearly five hundred, and the budget more than quadrupled.<sup>72</sup> The peak was reached in 1942 with a budget of \$2,325,000 and a total staff of 583 persons.<sup>73</sup> New cases jumped from eleven in 1938 to ninety-two in 1940 and investigations jumped from fifty-nine to two hundred fifteen in the same period. By February 1941, the Antitrust Division had ninety total criminal and civil cases pending involving 2909 defendants with thirty additional grand juries authorized or in progress.<sup>74</sup> Regional offices were established throughout the country to uncover, investigate, and prosecute antitrust violations with an eye and ear to what was going on both locally and nationally. Arnold delegated the responsibility of recruiting and training the staff to his chief deputy, Wendell Berge, with the order to create an organization with high prestige in the outside legal world and high morale inside the Division.<sup>75</sup> Such luminaries as future Supreme Court

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<sup>69</sup> See Strout, *supra* note 63, at 570-71.

<sup>70</sup> See Miscamble, *supra* note 1, at 13; Strout, *supra* note 63, at 570.

<sup>71</sup> ARNOLD, REPORT, *supra* note 58, at 4-6; Arnold, *Address at Banquet*, *supra* note 52, at 222; Arnold, *Antitrust Law Enforcement*, *supra* note 52, at 10; Arnold, *Feathers and Prices*, *supra* note 52, at 4.

<sup>72</sup> See ARNOLD, *supra* note 52, at 171, 276.

<sup>73</sup> Corwin D. Edwards, *Thurman Arnold and the Antitrust Laws*, 58 Pol. Sci. Q. 338, 339 n.1 (1943).

<sup>74</sup> Antitrust Division, Summary of Cases Under the Antitrust Laws (Feb. 19, 1941) (on file with American Heritage Center, University of Wyoming, Thurman Wesley Arnold Papers, 1891-1969).

<sup>75</sup> HAWLEY, *supra* note 6, at 432. Recruiting standards were so high that Arnold had to fend off charges that he would only hire men from Yale, Harvard, and Columbia. See Letter from Thurman W. Arnold to Gordon Dean (Oct. 15, 1938), in VOLTAIRE AND THE COWBOY, *supra* note 2, at 276. Wendell Berge, himself, led the Antitrust Division after Tom Clark from September 1943 until April 1947.

Justice Tom Clark and future Attorney General and University of Chicago President Edward Levi served in the Division under Arnold. With the help of a growing number of well-credentialed and ambitious young men, Arnold embarked on the most extensive program of civil and criminal cases in the history of antitrust, bringing nearly as many cases during his tenure as head of the Antitrust Division as in the prior fifty years the federal antitrust laws had been in existence.<sup>76</sup> He also created the first generation of true antitrust specialists the country had ever known, who would keep the Arnold flame for antitrust alive across the country for generations to come.

#### IV. THE TEMPORARY NATIONAL ECONOMIC COMMISSION

April 1938 brought the planning for Roosevelt's anti-monopoly message to Congress, with which Arnold, Cummings, and Jackson assisted, along with Donald Richberg, the head of the NRA, and Ben Cohen, the author of the Utility Holding Company Act. It was a stark illustration of the balance of power between the planners and the advocates of competition. It was apparent to all that Roosevelt finally intended to make a real attack on the problem of monopoly. Predictably, only Richberg dissented from the plan.<sup>77</sup>

The message itself was symbolically important but rather mild in actual content. The President decried the "concentration of economic power" in the country and deplored the "concealed cartel system" and "the disappearance of price competition."<sup>78</sup> The President thundered: "[T]he liberty of a democracy is not safe if the people tolerate the growth of private power to a point

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<sup>76</sup> See Miscamble, *supra* note 1, at 5.

<sup>77</sup> Arnold remembers the anti-monopoly message in his autobiography as a radio address where the original draft linked the monopoly problem to tariff reduction, reviving one of the earliest arguments in favor of the antitrust laws in the nineteenth century, but this was blue-penciled by Roosevelt. According to Arnold, he and Cohen then wrote and rewrote the message until it was short enough and simple enough for a Presidential radio address. Then Roosevelt added his effective personal touch to the message as Arnold watched him deliver it over the air to the nation. ARNOLD, *supra* note 23, at 137–38. This may be further proof of the Arnold maxim from later in life that some of the things he remembered the best never actually happened.

<sup>78</sup> Franklin D. Roosevelt, President's Message to Congress on the Concentration of Economic Power (Apr. 29, 1938), <http://publicpolicy.pepperdine.edu/academics/faculty/lloyd/projects/newdeal/fro42938.htm>.



where it becomes stronger than their democratic state itself . . . ."<sup>79</sup>

The recommendations were hardly stirring, however. Roosevelt asked for \$200,000 in additional funds to expand the antitrust division, a \$500,000 budget to investigate the monopoly problem, and legislation to control bank holding company acts—almost certainly the brain child of Ben Cohen. No new specific antitrust legislation or initiative beyond the anti-monopoly inquiry was sought.

Even this ambivalent message was the product of in-fighting between the Jackson and Richberg wings of the administration, each of which presented separate drafts to Roosevelt. Richberg's original draft revived the idea of self-regulation or industrial self-government as in the NRA. Roosevelt rejected this despite support from Cummings. Jackson then became the primary drafter of the final version sent to Congress.<sup>80</sup> Overall, it was only a slight victory for trustbusters in terms of specific proposals, but it was a radical victory for Arnold and the other antitrusters in terms of the attitude toward the kind of wholesale cartelization previously endorsed by the NRA. To have the President talking about the "concentration of private power without equal in history" was sweet music to Arnold indeed.<sup>81</sup>

Although new to the public, the idea for the Temporary National Economic Committee (TNEC) had been floating around the Roosevelt administration since 1935 when it was first proposed by Leon Henderson.<sup>82</sup> Since then, it was part of the continuing fight between the trustbusters and the planners and others in the New Deal who saw the TNEC as the vehicle to promote a variety of diverse ideas, including: new antitrust legislation; greater antitrust enforcement; concern over administered pricing; fear about under-consumption; attempts at greater economic regulation; and the national licensing of corporations.<sup>83</sup> Even Roosevelt was not set on the need of the TNEC until just weeks before his anti-monopoly message as he continued to vacillate between endorsing a renewed version of

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<sup>79</sup> S. DOC. NO. 75-173 (3d Sess. 1938).

<sup>80</sup> Drew Pearson, *Washington Merry-Go-Round*, WASH. HERALD, May 5, 1938.

<sup>81</sup> Roosevelt, *supra* note 78.

<sup>82</sup> HAWLEY, *supra* note 6, at 405.

<sup>83</sup> See BRINKLEY, *supra* note 1, at 122-31.

the NRA, promoting greater antitrust enforcement, or supporting federal incorporation of interstate businesses.

The fight over the purpose and form of the TNEC continued on Capitol Hill. Senator O'Mahoney sponsored the congressional resolution for the TNEC. Borah remained aloof to the idea of a commission, preferring to focus on the need for specific new antitrust legislation.<sup>84</sup>

The initial proposal for the committee called for two members of the Senate, two from the House, plus representatives of the Attorney General, the FTC, and the SEC, to study: the causes and effects of concentration on competition; pricing policies and their effect on the general level of trade and employment; and the effect of existing tax, patent and other government policies on competition, price levels, employment and consumption. Five hundred thousand dollars was to be appropriated for the work of the TNEC.<sup>85</sup>

On June 7, 1938, the resolution passed the judiciary committee, but called for an expanded Commission of six representatives of the Congress, plus representatives from the Departments of Commerce, Labor, the Treasury, Justice, the SEC, and the FTC. The Committee would have a direct budget of \$100,000 and could hand out \$400,000 to the agencies for staff who would do the heavy lifting for the committee. An additional \$600,000 appropriation was eventually forthcoming.

Senator O'Mahoney, and Arnold's old critics from the right and the left, Senators King and Borah, were named to the TNEC, with O'Mahoney as the chair. No prominent New Deal senators were included. The House nominees were Hatton W. Summers, a veteran Texas Democrat, B. Carroll Reece, an independent-minded Republican from Tennessee, and Edward C. Eicher, a liberal New Deal Democrat from Iowa. O'Mahoney became the driving force behind the TNEC as King lost reelection and Borah died. The other congressional appointees lacked influence, and frequent changes in the rest of the TNEC membership left O'Mahoney as virtually the sole enthusiastic member present from start to finish.

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<sup>84</sup> Robert C. Albright, *Senate to Get Bill for Trust Quiz Today*, WASH. POST, May 5, 1938, at X1.

<sup>85</sup> Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029, 1032 (2003).

The Commerce Department as the voice of the business community was viewed as sabotaging the mission of the TNEC. However, the other department and agency appointees were all tried and true new dealers including William Douglas from the SEC and Herman Oliphant, the General Counsel of the Treasury, who was a former antitrust scholar at Columbia Law School.<sup>86</sup> The Executive Secretary of the TNEC was Leon Henderson, an economic adviser in the Commerce Department, who paradoxically supported both greater antitrust enforcement and greater governmental planning of the economy.<sup>87</sup> In many ways, the infighting over the mission and scope of the TNEC mirrored the more general fight over economic policy in the new deal.<sup>88</sup>

The TNEC met for the first time on July 1, 1938 and immediately was embroiled in battles over the scope of subpoenas, the site of hearings and which industries to study. Finally, the Committee agreed it would work in teams of one legislator and one agency official with hearings to begin in September, later postponed until after the November elections. The investigation meandered through the insurance, banking, steel, oil, liquor, investment banking, and automobile industries and further examined the impact of cartels, state fair trade laws, patents, and various other competitive practices.

Arnold was assigned to head the inquiry into patents. To facilitate the hearings, Arnold agreed on behalf of the Justice Department that the TNEC's investigation would not be used to gather evidence for Antitrust Division prosecutions.<sup>89</sup>

Eventually, the TNEC produced thirty-seven volumes of testimony and forty-three monographs. In all, there were 20,000 pages of testimony, 552 business witnesses, and over 230,000 copies of the hearings and monographs sold by the Government

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<sup>86</sup> Douglas left shortly after the creation of the TNEC to join the Supreme Court. He was replaced by SEC Commissioners Jerome Frank and then Sumner Pike. Oliphant was also an antitrust scholar and legal realist. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 9-10, 19-20, 29-32, 68-74, 109-113 (G. Edward White ed., 1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* *passim* (Thomas A. Green & Hendrik Hartog eds., 1995); Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 286-87 (2001). Oliphant died within a year of the beginning of the TNEC's work.

<sup>87</sup> BRINKLEY, *supra* note 1, at 83.

<sup>88</sup> *Id.* at 124-31.

<sup>89</sup> Press Release, Department of Justice Release (July 14, 1938).

Printing Office.<sup>90</sup> The TNEC and the various agencies working with it spent virtually the entire budget allotted to them, returning a paltry \$8000 of more than \$1,000,000 to the Treasury.<sup>91</sup>

The TNEC issued its final report on March 31, 1941. The report recommended: repealing the Miller-Tydings Act, which had authorized state fair trade laws; prohibiting horizontal mergers in excess of \$5 million unless approved by the FTC; prohibiting basing point pricing; raising penalties for criminal antitrust violations to \$50,000; creating federal regulation of trade associations; requiring mandatory licensing of patents at fair prices; and establishing the national chartering of corporations.<sup>92</sup>

The TNEC produced detailed, thoughtful studies on the state of competition in various industries and the state of antitrust more generally, and made reasonable recommendations for its time, but no new antitrust legislation emerged directly from the effort. Senator O'Mahoney steered the TNEC to lay out the record about the state of competition in copious detail, but to leave the drawing of conclusions to others. No one ever really made any conclusions and Arnold viewed the final work product of the TNEC with the same degree of enthusiasm that he viewed the earlier empirical work of the legal realists—as ignored and unread. After initially participating halfheartedly in the work of the TNEC, Arnold soon left the work to his subordinates and concentrated his efforts on the nationwide enforcement of the antitrust laws.<sup>93</sup>

A few developments came out of the TNEC which made the exercise something more than the gigantic waste of time portrayed by Arnold. It was essentially “an anti-monopoly document” with a nod toward Chairman O'Mahoney's long-standing interest in the national chartering of corporations.<sup>94</sup>

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<sup>90</sup> TEMPORARY NAT'L ECON. COMM., FINAL REPORT AND RECOMMENDATIONS, S. DOC. NO. 77-35, at 696 (1st Sess. 1941).

<sup>91</sup> CHRISTIAN SCIENCE MONITOR, Mar. 31, 1941.

<sup>92</sup> S. DOC. NO. 77-35.

<sup>93</sup> ARNOLD, *supra* note 23, at 139–44.

<sup>94</sup> Senator Joseph C. O'Mahoney was the Chairman of the TNEC. He “was identified more prominently with [the issue of national charters for corporations] than any other politician of the era.” Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037, 1050–52 (1986); see also S. DOC. NO. 77-35, at 681–84.

Although the final report of the TNEC was mild stuff calling for no dramatic changes in antitrust, the hearings included a vivid demonstration of how the Hartford-Empire Company had monopolized the glass container market through the acquisition and misuse of patent rights and collusion with competitors who held patent rights for related technologies.<sup>95</sup> The Antitrust Division eventually charged Hartford-Empire in a separate monopolization case and ultimately required the company to license its vast array of patents and forego damages from past infringements.<sup>96</sup> The revelations also prompted Congress to amend the patent laws consistent with some of the TNEC's recommendations. Moreover, the TNEC was the key impetus leading to the eventual 1950 strengthening of the merger provisions of the Clayton Act and a source of the eventual adoption of mandatory pre-merger notification.<sup>97</sup>

In addition, the TNEC stabilized antitrust policy and made it a fundamental part of the government's law enforcement and economic regulation policies. The decade that followed the TNEC produced a high point in both the reach of antitrust doctrine and antitrust enforcement, neither of which would have been possible without the dual efforts of Arnold as head of the Antitrust Division and the buttressing effect of the TNEC as state of the art economic research on the condition of the American economy.

## V. ENFORCING THE ANTITRUST LAWS

Arnold's first large case involved the automobile industry. The "big three" car companies had long coerced dealers to finance customer purchases through finance companies owned by the manufacturers and to bar—as much as possible—the use of independent finance companies. The Antitrust Division investigated and challenged the practice in Milwaukee, Wisconsin, but suffered a serious setback when the supervising judge threw out the case, offended that the Justice Department appeared to have used the threat of criminal indictment to force a civil settlement.

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<sup>95</sup> ARNOLD, *supra* note 23, at 140–41.

<sup>96</sup> *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1944). This case was later clarified by the Supreme Court in *Hartford-Empire Co. v. United States*, 324 U.S. 570 (1945).

<sup>97</sup> 15 U.S.C. § 18(a) (2000).

Arnold was undeterred and sought a friendlier venue for round two of the litigation. He visited South Bend, Indiana on a speaking trip and used the occasion to prepare for summoning a new grand jury to investigate the same auto finance issues.<sup>98</sup> The coercion of dealers and discrimination against independent finance companies was again the focus of the investigation. The grand jury investigation was expected to last six weeks, but indictments were issued in five days. Eighty-six firms and individuals were indicted including the biggest names in the industry. Attorney General Cummings announced the indictments, but also announced he was willing to listen to voluntary offers for consent decrees.<sup>99</sup> Within weeks, every company involved, except General Motors, approached the government to negotiate.

In the end, the Antitrust Division worked out a civil consent decree with Ford and Chrysler<sup>100</sup> and obtained a conviction against General Motors.<sup>101</sup> The settlement was a highly regulatory decree that imposed complex obligations on the car companies and a registration system for the entire finance industry to assure its fair and equal treatment by the manufacturers.<sup>102</sup> It was as if the playbook for the Antitrust Division came from Arnold's own writings. It was an ad hoc regulatory solution to address a pressing societal need dressed up in law enforcement terms to satisfy the folklore of the times.

Other early cases brought by Arnold were designed to appeal to consumer interests and to show how cartels and monopolies—in Arnold's terms, "bottlenecks"—caused higher prices and artificial shortages. In Arnold's words: "To catch their imaginations you must talk in terms of concrete items in the family budget."<sup>103</sup>

In July 1938, Arnold brought a civil suit against the motion picture industry seeking to force the major studios to divest their ownership of movie theaters and change their licensing practices to independent exhibitors.<sup>104</sup> The suit made headlines both because Arnold announced that he would personally lead the

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<sup>98</sup> S. BEND TRIB. May 17, 1938.

<sup>99</sup> S. BEND TRIB., May 18, 1938.

<sup>100</sup> HAWLEY, *supra* note 6, at 433.

<sup>101</sup> ARNOLD, *supra* note 52, at 209.

<sup>102</sup> HAWLEY, *supra* note 6, at 433.

<sup>103</sup> ARNOLD, *supra* note 52, at 123.

<sup>104</sup> HAWLEY, *supra* note 6, at 436.

case and because the complaint named all eight major studios and over 130 individuals including the President's son James Roosevelt, Charlie Chaplin, Douglas Fairbanks, Mary Pickford, and other prominent Hollywood celebrities who served on the boards of the studios.

In November 1938, the Division brought indictments against the dairy industry that Arnold claimed had raised the price of milk more than 40%.<sup>105</sup> The case against the milk industry in Chicago supposedly produced \$10,000,000 a year in consumer savings.<sup>106</sup>

Arnold claimed his antitrust campaign against the housing and construction industries saved consumers over \$300,000,000.<sup>107</sup> An internal Antitrust Division memo estimates the "minimum" consumer savings from antitrust "pressure" in the tire, newsprint, steel ingot, potash and, sulphur at over \$266,000,000.<sup>108</sup> Even a case against local Washington, D.C. service stations produced estimated savings of \$2,000,000.<sup>109</sup>

Each new case or grand jury investigation brought nationwide press coverage, often on the front page of the city newspaper where the case or investigation was brought. Arnold would tell anyone who would listen that this incredible flurry of activity was no crusade, but simply "law enforcement."<sup>110</sup>

Almost simultaneously, trial resumed in the Alcoa monopolization case. The stakes were high. The monopolization charges against Alcoa were the most important in a generation, rivaling those against Standard Oil and U.S. Steel in the past, and the cases against AT&T and Microsoft in the far distant future. Andrew Mellon, the founder of Alcoa and former Secretary of the Treasury, had been indicted the previous year, but died before trial began.

The case resumed on June 1, 1938 with Arnold at the counsel table. Alcoa was represented by Charles Evan Hughes

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<sup>105</sup> *Id.* at 435-36.

<sup>106</sup> ARNOLD, *supra* note 52, at 194.

<sup>107</sup> HAWLEY, *supra* note 6, at 439.

<sup>108</sup> Memorandum from George P. Comer to Johnston Avery (Dec. 18, 1939) (on file with American Heritage Center, University of Wyoming, Thurman Wesley Arnold Papers, 1891-1969). By the time *Bottlenecks* appeared in print, the estimated savings was reduced to \$170,000,000 at a cost of only \$200,000 for the investigations and subsequent prosecutions. ARNOLD, *supra* note 52, at 77.

<sup>109</sup> ARNOLD, *supra* note 52, at 48.

<sup>110</sup> U.S. NEWS, August 1, 1938.

Jr., the son of the former presidential candidate and Supreme Court Justice.

The Antitrust Division promised to prove that Alcoa had a complete monopoly throughout the western hemisphere in the virgin aluminum and bauxite industries and controlled output to the rest of the world through subsidiaries, affiliates, and a cartel with foreign producers.<sup>111</sup> Alcoa originally had a lawful monopoly on the production of aluminum from bauxite ore through various patents which expired in the early part of the twentieth century.<sup>112</sup> An earlier antitrust suit by the United States in 1912 had eliminated certain restrictive covenants and cartel arrangements with foreign producers which had further buttressed Alcoa's monopoly of the American aluminum market. Nevertheless, Alcoa still sold more than 90% of the virgin aluminum ingot in the United States, although a growing amount of recycled ingot was also on the market. Imports remained nil due to Alcoa's continuing participation in international cartel arrangements. New domestic competition was almost impossible given Alcoa's aggressive expansion and its lock on sources of hydroelectric power, the single most important input for aluminum production after bauxite ore itself.

The trial lasted until August 14, 1940, after more than 40,000 pages of testimony had been taken and 10,000 pages of exhibits entered into evidence.<sup>113</sup> The *New Yorker* claimed it was the longest trial in the history of the world and that the trial record was three times heavier than the *Encyclopedia Britannica* and thirty times longer than *Gone with the Wind*.<sup>114</sup>

The district court judge immediately issued a draft oral opinion dismissing all charges, which itself took nine days to deliver. The formal written opinion did not appear until September 30, 1941.<sup>115</sup> The government appealed directly to the Supreme Court, but on June 12, 1944 the Supreme Court referred the case to the Second Circuit because it lacked a

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<sup>111</sup> See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 422-23 (2d Cir. 1945) (discussing the monopoly Alcoa possessed in the production of virgin ingot).

<sup>112</sup> See *id.* at 422.

<sup>113</sup> Alva Johnson, *Thurman Arnold's Biggest Case*, NEW YORKER, Jan. 24, 1942, at 25.

<sup>114</sup> *Id.*

<sup>115</sup> *United States v. Aluminum Co. of Am.*, 44 F. Supp. 97 (S.D.N.Y. 1941), *rev'd*, 148 F.2d 416 (2d Cir. 1945).



quorum of six justices to hear the case.<sup>116</sup> The Court was down to only eight members because Roosevelt had not yet filled the seat formerly held by Justice Byrnes. Justices Jackson, Reed and Murphy presumably were disqualified for their earlier work on the case for the Roosevelt Justice Department, and Chief Justice Stone was similarly disqualified because of his earlier involvement in prosecuting Alcoa while Attorney General under Coolidge. Even if Roosevelt had filled the vacancy, there may not have been a quorum for this critical case.

It was not until March 12, 1945, when Arnold was near the end of his own service as a federal appellate judge, that the Second Circuit upheld the government's case and created landmark precedent on what constitutes a monopoly, when a monopoly's actions violate antitrust law, and when anticompetitive conduct outside the United States constitutes a violation of the Sherman Act.<sup>117</sup> Even then, the court deferred the issue of remedy until after the war.

All the while, Arnold and his staff worked at a furious pace and seemingly on dozens of matters at once. Far from shying away from investigating or attacking the sacred cows of the economy, Arnold seemed to delight in tormenting them. On August 1, 1938, Arnold announced a grand jury investigation of the American Medical Association's (AMA) opposition to group health plans. He focused on the District of Columbia,<sup>118</sup> where federal employees had formed the Group Health Association, Inc. (GHA) to provide a prepaid medical plan akin to a modern HMO. GHA retained its own physicians who agreed to provide the members virtually complete medical care. The AMA, the District of Columbia Medical Society, and its officers and directors reacted by threatening to expel any physicians who provided services to GHA or consulted with any GHA physicians, and further denied hospital privileges to any GHA physicians.

Arnold tied the medical industry's restrictions to the high cost of medical care, the failure to provide adequate medical care

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<sup>116</sup> *United States v. Aluminum Co. of Am.*, 322 U.S. 716 (1943).

<sup>117</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

<sup>118</sup> A special provision of the antitrust laws applies to the District of Columbia without the need to show an effect on interstate commerce. 15 U.S.C. § 3 (2000). This was still a potentially thorny issue for an investigation in the medical profession in the 1930s. Decades later, the Supreme Court resolved the issue of the effect of the practice of medicine on interstate commerce in a closely divided Court. *Pinhas v. Summit Health, Ltd.*, 500 U.S. 322 (1991).

to lower income families, and even to preventable infant mortality.<sup>119</sup> Although common-place today, Arnold appears to have broken new ground in the AMA case in using FBI agents to assist in the gathering of evidence against the AMA.<sup>120</sup>

The AMA case began a war of words. Arnold was accused of everything from promoting socialized medicine to perverting the antitrust laws for attacking a voluntary professional association.<sup>121</sup> Arnold fired back by releasing a letter to counsel for the District of Columbia Medical Society expressing the expectation that the Medical Society would cease the "coercion of qualified people in the practice of their profession" and laying out his case in a nationwide radio broadcast on August 19, 1938. Despite the controversy, Roosevelt supported the AMA investigation<sup>122</sup> and Attorney General Cummings publicly backed Arnold as well.<sup>123</sup>

It appeared at first that the AMA case would not even make it to trial. Initially, the district court threw out the indictments on the grounds that the practice of medicine was not "trade" and thus not covered by the antitrust laws.<sup>124</sup> However, it was later reversed on appeal.<sup>125</sup>

At trial the defendants were convicted and fined; \$2500 for the AMA and \$1500 for the District of Columbia Medical Society. The case ended in January 1943 with a total victory in the Supreme Court in a case which Arnold argued personally.<sup>126</sup> By a six to zero vote the Court upheld the application of the

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<sup>119</sup> *Statement by Assistant Attorney General Thurman Arnold, Chief of the Anti-Trust Division of the Department of Justice*, 49 CURRENT HIST. 49 (1938).

<sup>120</sup> See KURT EICHENWALD, *THE INFORMANT* (2000).

<sup>121</sup> See, e.g., *The Department of Justice Intervenes in Medical Care*, 111 JAMA 534 (1938) (suggesting that Arnold and the federal administration were "us[ing] the laws and the courts to mold the people of the United States to [their] beliefs in every phase of life and living"). Some critics wondered sarcastically if bar associations were next. LACROSSE TRIB. Aug. 5, 1938. They were eventually proven correct as mandatory price schedules and restrictions on lawyer advertising fell under antitrust and First Amendment attack. See *Bates v. State Bar of Va.*, 433 U.S. 350, 384 (1977) (holding that the state may not restrain "truthful advertisement concerning the availability and terms of routine legal services").

<sup>122</sup> WASH. TIMES, Aug. 2, 1938.

<sup>123</sup> CHI. DAILY TRIB., Aug. 2, 1938.

<sup>124</sup> *United States v. Am. Med. Ass'n*, 28 F. Supp. 752, 758 (D.D.C. 1939) (dismissing the indictment), *rev'd*, 110 F.2d 703, 716 (D.C. Cir. 1940).

<sup>125</sup> *United States v. Am. Med. Ass'n*, 110 F.2d 703, 716 (D.C. Cir. 1940) (reinstating the indictment).

<sup>126</sup> *Am. Med. Ass'n v. United States*, 317 U.S. 519, 523, 536 (1943).

antitrust laws against the AMA and the District of Columbia Medical Society and held that they engaged in an illegal boycott against the clinic.<sup>127</sup>

No industry was safe if it demonstrated either signs of price fixing or monopolization. Arnold obtained a landmark ruling that the insurance industry was engaged in interstate commerce, rendering it subject to the federal antitrust laws.<sup>128</sup> This ruling was promptly overturned by statute in one of the few congressional rebukes to the Arnold enforcement regime.<sup>129</sup> Other cases were brought or concluded against the retail, tire, fertilizer, tobacco, shoe, construction, dairy, and various agricultural industries.

The Antitrust Division did not just deal with the blockbuster cases. Arnold also brought indictments against smaller local industries including the wooden ice cream stick industry in New York.<sup>130</sup> By the end of the fiscal year in 1939, there were 1375 complaints pending in 213 cases involving forty industries with 185 continuing investigations.<sup>131</sup>

## VI. THE SOCONY VACUUM CASE

Perhaps no case was more important than the proceeding against the oil industry. The oil industry had been plagued for years with falling prices and the problem of so-called "hot oil," which was oil that had been produced in violation of state quotas and dumped on the market, driving down the price, often below the cost of production. To counter falling oil prices, the major oil companies devised a plan whereby they would buy up hot oil at prevailing market prices. Each major oil company tracked the production of one or more of the smaller independent refiners and agreed to buy the oil of its "dancing partner" as it came on the market. Officials in the Roosevelt administration were

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<sup>127</sup> *Id.*

<sup>128</sup> *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

<sup>129</sup> *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000) (limiting the applicability of the federal antitrust laws to the insurance industry).

<sup>130</sup> Various materials and correspondence (on file with American Heritage Collection, University of Wyoming, Thurman Wesley Arnold Papers, 1891-1969, box 88, file 1).

<sup>131</sup> Various materials and correspondence (on file with American Heritage Collection, University of Wyoming, Thurman Wesley Arnold Papers, 1891-1969, box 88, file 3).

aware of the plan and had given their unofficial acquiescence, if not outright approval, both during and after the NRA.

No one, of course, sought or obtained the approval of the Antitrust Division, nor would any have been forthcoming. From the perspective of the Antitrust Division, it was plain and simple price fixing. The nods and winks of the planning wing of the administration did not amount to a defense. Although the case only concerned post-NRA activity, Arnold contended that the practices existed since 1931 before the NRA even started, were never covered by any NRA code, and continued after the NRA had been declared unconstitutional.<sup>132</sup> The indictment charged twenty-seven companies and fifty-six of their officers with criminal violation of the Sherman Act.

*United States v. Socony-Vacuum Oil Co.*<sup>133</sup> had a long and tortured history. The indictments were originally brought in Madison, Wisconsin in December 1936 while Jackson still headed the Antitrust Division. Following a number of guilty and *nolo contendere* pleas, twenty-six companies and forty-six individuals went to trial.<sup>134</sup> The sheer scope of the case required over one hundred lawyers for the defendants, who leased an entire hotel for the duration of the trial.<sup>135</sup>

Just before jury deliberations, the judge dismissed the case against ten companies and sixteen individuals.<sup>136</sup> The rest were found guilty by the jury.<sup>137</sup> The judge granted new trials to some of the defendants and granted outright dismissals to others, leaving twelve corporations and five individuals guilty as charged.<sup>138</sup> The court fined the corporations \$5000 and the individuals \$1000.<sup>139</sup> On appeal, all of the defendants were granted new trials on the grounds that the informal arrangement was not per se illegal, that the trial judge

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<sup>132</sup> The key provisions restricting the sale of so-called hot oil had been declared unconstitutional in January 1935. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 411, 433 (1935).

<sup>133</sup> 310 U.S. 150 (1940).

<sup>134</sup> *Id.* at 165 n.1.

<sup>135</sup> ARNOLD, *supra* note 52, at 208.

<sup>136</sup> *Socony-Vacuum*, 310 U.S. at 165 n.1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 165 n.2.

improperly excluded much of the defendants' proffered evidence and gave the jury improper instructions as to the law.<sup>140</sup>

To underscore the importance of the case, Arnold argued the appeal himself in the Supreme Court against William "Wild Bill" Donovan, later to become the head of the Office of Strategic Services (OSS) during World War II. Arnold told the Justices that the agreement among the oil companies was "an attempt to set up the NRA again without control."<sup>141</sup> According to press reports, Arnold got carried away and shouted that similar practices were so prevalent in the economy that "[t]his case represents the most dangerous threat to the enforcement of the anti-trust laws ever seriously presented to this court."<sup>142</sup>

Arnold again prevailed in the Supreme Court. On May 6, 1940, the Supreme Court affirmed the convictions of all defendants in a five to two decision written by Justice William Douglas, Arnold's old friend from Yale.<sup>143</sup> Douglas had been on the Court for barely one year and the oil case was his first antitrust opinion.

Douglas's opinion ran for nearly one hundred printed pages and did more than just vindicate the government's prosecution. It established the key principles of modern antitrust law. First, it held that price fixing was illegal *per se* regardless of why the defendant conspired, whether the prices fixed were reasonable, or whether the defendants raised, lowered, or merely stabilized prices.<sup>144</sup> Moreover, avoiding ruinous competition or competitive evils was not a defense.<sup>145</sup>

Douglas wrote in a thundering style that would be typical of his years on the Court:

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the

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<sup>140</sup> *United States v. Socony-Vacuum Oil Co.*, 105 F.2d 809, 827, 832, 833 (7th Cir. 1939), *rev'd*, 310 U.S. 150 (1940).

<sup>141</sup> *Unfettered Price Called Goal in Oil*, N.Y. TIMES, Feb. 7, 1940, at 37.

<sup>142</sup> *Id.*

<sup>143</sup> *Socony-Vacuum*, 310 U.S. at 165-66, 254. Chief Justice Hughes and Justice Murphy did not participate in the case. *Id.* at 254. Justice Roberts wrote a dissent in which Justice McReynolds concurred. *Id.* at 254-67 (Roberts, J., dissenting).

<sup>144</sup> *Id.* at 218, 221.

<sup>145</sup> *Id.* at 221-22.

commodity in the interstate or foreign channels of trade, the power to fix prices exists if the combination has control of a substantial part of the commerce in that commodity.<sup>146</sup>

Then, in the most famous footnote in the history of antitrust, Douglas essentially held that since the Sherman Act prohibited "conspiracies" in restraint of trade, the violation was complete with the agreement to accomplish the illegal objective, even if the defendants lacked the power to carry out the plan, or if the plan produced no actual effects in the markets.<sup>147</sup>

Although technically Douglas distinguished, rather than overruled the earlier case of *Appalachian Coals, Inc., v. United States*,<sup>148</sup> Douglas's rhetoric destroyed whatever was left of that earlier NIRA tinged decision, which had appeared to open the door to some price fixing under some circumstances. Had *Appalachian Coals* remained the law of the land, criminal antitrust prosecution would be virtually impossible. Each defendant would have been able to raise any number of reasons why it was reasonable to agree with their competitors as to price or production making proof beyond a reasonable doubt an impossible burden for the government.

The Court then rejected the defense that government knowledge, or even acquiescence, in the price stabilization scheme was a defense. According to Douglas, only Congress, not the executive branch, could confer immunity from the antitrust laws.<sup>149</sup> Thus, *Socony-Vacuum* was also the final death knell for the planning wing of the new deal and whatever informal versions of the NIRA that existed after the *Schechter Poultry* ruling.

## VII. THE PATENT CASES

The one type of investigation that cut across industry lines was Arnold's crusade against the misuse of patents. Arnold railed against the misuse of patents every chance he could as a tool of price fixing, division of markets among competitors, and monopolization.<sup>150</sup> In a speech before the American Business

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<sup>146</sup> *Id.* at 223-24.

<sup>147</sup> *Id.* at 224 n.59.

<sup>148</sup> 288 U.S. 344 (1933), overruled by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

<sup>149</sup> *Socony-Vacuum*, 310 U.S. at 225-28.

<sup>150</sup> *Patents Part 7: Hearing on S. 2303 and S. 2491 Before the Senate Comm. on*

Congress, broadcast nationwide over the Mutual Radio Network, Arnold said, "Since 1926 the most effective instrument of monopoly control and restriction of production has been the abuse of the patent privilege."<sup>151</sup> In a letter to one of Roosevelt's top aides he argued, "[t]he real vice of the patent system does not lie in the law itself but in the various schemes which have perverted it into an instrument for the monopoly control of corporations."<sup>152</sup> He instituted numerous investigations and cases alleging that competitors used patent and other licenses as a disguise for traditional price fixing and cartel arrangements in international markets.<sup>153</sup> He publicized how the control of a patent for a lowly screw fastener became a vital bottleneck slowing down aircraft production and the war effort.<sup>154</sup>

Arnold also brought a landmark case against the Hartford-Empire Company for monopolizing the glass container industry through its accumulation of patents and its licensing practices.<sup>155</sup> He continued the earlier *Ethyl Gasoline* case and personally argued it in the Supreme Court, winning a ruling that patents could not be used to set prices for resale or to impose restrictions on matters outside the scope of the patent.<sup>156</sup> Moreover, Arnold argued the *Univis Lens* case in the Supreme Court where the

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*Patents*, 77th Cong. 2 (1942) (statement of Thurman W. Arnold, Assistant Attorney General, Justice Department); *Patents Part 2, Hearing on S. 2303 Before the Senate Comm. on Patents*, 77th Cong. 3-7 (1942) [hereinafter *Hearing, Patents Part 2*] (statement of Thurman W. Arnold, Assistant Attorney General, Justice Department); ARNOLD, *supra* note 52, at 173-81 (describing how industry exploited the overlap of the Sherman Act and patent law). See generally Thurman W. Arnold, *The Abuse of Patents*, ATLANTIC, July, 1942, at 14; Thurman Arnold, *We Must Reform the Patent Law*, ATLANTIC, Sept., 1942, at 47.

<sup>151</sup> Thurman Arnold, *The Abuse of Patents*, Address Before the American Business Congress (July 28, 1942) (transcript available at American Heritage Center, University of Wyoming, Thurman Wesley Arnold Papers, 1891-1969, box 106).

<sup>152</sup> Letter from Thurman W. Arnold, Assistant Attorney General, to Isador Lubin, Director, Statistical Analysis Branch, Munitions Assignment Board, Combined Chiefs of Staff (Sept. 20, 1943) (on file at University of Texas at Austin, Tarlton Law Library, Walton Hamilton Collection, box J11, folder 2).

<sup>153</sup> Many of these cases were postponed because of the advent of war and came to fruition long after Arnold had left the Justice Department. See, e.g., *United States v. Timken Roller Bearing Co.*, 341 U.S. 593 (1951).

<sup>154</sup> *Hearing, Patents Part 2, supra* note 150, at 2-5 (statement of Thurman Arnold, Assistant Attorney General, Justice Department).

<sup>155</sup> *Hartford-Empire Co. v. United States*, 323 U.S. 386, 392 (1945).

<sup>156</sup> *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 456-59 (1940).

Court also condemned the use of patent licenses as a device to control resale prices of the licensee to the public.<sup>157</sup>

### VIII. ASSOCIATED PRESS

The controversial suit against the Associated Press (AP) was filed in August 1942—shortly after Colonel McCormick, the publisher of the *Chicago Tribune* blocked Marshall Field from getting AP service for the new *Chicago Sun* paper.<sup>158</sup> Arnold had been aware for some time of the AP's restrictive bylaws that prevented AP members from sharing news with non-members and that also gave current AP members a veto over new entrants in their market. Earlier in 1940, he unsuccessfully tried to get Eleanor "Cissy" Patterson, a family friend and publisher of the *Washington Times-Herald*, who was also a cousin of Colonel McCormick of the *Chicago Tribune*, to file a complaint. Patterson's paper had been blocked from AP membership by her competitor, the *Washington Post*, but for family or personal reasons, she refused to cooperate.

When Arnold later prosecuted her cousin and the rest of the industry, Patterson bitterly denounced Arnold and the case as an attack on freedom of the press.<sup>159</sup> At the height of the case, Colonel Robert McCormick even called Arnold "an idiot in a powder mill," an epithet that Arnold treasured for the rest of his career.<sup>160</sup> Eventually, a majority of the Supreme Court saw the matter Arnold's way and required the restructuring of the AP bylaws to prevent newspapers from vetoing new AP members in their territories. The opinion by Justice Black stands as one of the few to link the goals of free competition under the antitrust laws to the free expression of ideas under the First Amendment.<sup>161</sup>

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<sup>157</sup> United States v. Univis Lens Co., 316 U.S. 241, 250 (1942).

<sup>158</sup> Press Release, Department of Justice (Aug. 28, 1942) (on file with American Heritage Center, University of Wyoming, Thurman Wesley Arnold Papers, 1891–1969, box 60).

<sup>159</sup> Cissy Patterson's biography recalls this incident quite differently. Patterson contends that she tried to get Arnold to file suit but that he refused to do so unless Patterson's *Washington Times-Herald* more strongly supported President Roosevelt editorially for reelection in 1940. There is no support offered for this supposed direct quid pro quo, particularly at a time when Patterson's *Washington Times-Herald* had not definitively broken with the Roosevelt administration. See ALICE ALBRIGHT HOGE, Cissy Patterson 190 (1966).

<sup>160</sup> ARNOLD, *supra* note 23, at 114.

<sup>161</sup> Associated Press v. United States, 326 U.S. 1, 20 (1945).



## IX. THE LABOR CASES

A lasting blemish on Arnold's record remains his quixotic pursuit of a series of antitrust cases against labor unions. Arnold planned to attack restraints involving entire industries— affecting bottom-line consumer interests in their entirety— where attacking any single aspect of the problem would likely not remove the bottlenecks. In housing and construction, this meant attacking a web of interlocking restraints involving manufacturers, contractors, and labor unions which artificially inflated the cost of housing at a time when the national economy had not yet recovered from the crash of 1929.

Arnold conceived of the campaign against this deep-seated set of restraints on competition in manufacturing, distribution, and labor as an even-handed attack on the misuse of economic power. Arnold wrote:

Whenever a small group of individuals, uncurbed by legal authority, is permitted to dominate any important part of the production or distribution of the necessities of life, these results will inevitably follow:

They seek to consolidate their power by destroying existing independent enterprise.

They prevent new enterprise from entering the field.

They restrict production and raise prices.

They stop the introduction of more efficient methods of production in order to maintain obsolete ways in which they have a vested interest.

They set up an arbitrary and despotic control over the industry and exploit members of their own group.

They enter into politics, using money and economic coercion to maintain themselves in power.<sup>162</sup>

Although by no means anti-labor, Arnold had a blind spot regarding the symbolism of attacking labor unions through the antitrust laws. It was, however, simply impossible to apply the antitrust laws equally to business and labor, even if Arnold was right on some theoretical level.<sup>163</sup> Under the common law and in

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<sup>162</sup> Thurman Arnold, *Labor Against Itself*, READER'S DIG., Jan. 1944, at 37, 38–39.

<sup>163</sup> Letter from Thurman W. Arnold, Assistant Attorney General, to Robert H. Jackson, Attorney General (Jan. 23, 1940), in *VOLTAIRE AND THE COWBOY*, *supra*

the early days of the antitrust laws, the Department of Justice attacked labor unions as unlawful conspiracies—their activities enjoined by the courts and their leaders often imprisoned—while manufacturers were free to conspire with virtual impunity. Congress reacted by passing not one but two different provisions immunizing labor unions from the antitrust laws.<sup>164</sup>

What troubled Arnold was how labor, particularly in the construction industry, inflated costs, restricted production, blocked cost-saving innovations, enlisted business in jurisdictional disputes with other unions, and generally contributed to the paradox of the Depression of want in the midst of plenty. For example, Arnold wrote in his official capacity to a labor leader that “[t]he union may not act as a private police force to perpetuate unnecessarily costly and uneconomic practices in the housing industry.”<sup>165</sup>

Arnold also objected to the secondary boycott where a union boycotted persons doing business with a firm involved in a labor dispute. He disliked the coercive effect this tactic had on innocent and otherwise uninvolved parties and how it greatly increased the power of some unions like the Teamsters over other unions like the United Auto Workers which were not in a position to engage in such behavior with the customers of the firms which employed their members.<sup>166</sup>

Although this hardly endeared Arnold to most of his liberal pro-labor friends and New Deal colleagues,<sup>167</sup> Arnold held fast to his belief that labor restrictions were the equivalent of a hidden tariff, a private tax, a restraint on interstate commerce, and a huge contributor to increased prices to consumers from his

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note 2, at 300; Letter from Thurman W. Arnold, Assistant Attorney General to Freda Kirchwey, Editor, *The Nation*, (Dec. 14, 1939), in *VOLTAIRE AND THE COWBOY*, *supra* note 2, at 298.

<sup>164</sup> See 15 U.S.C. § 17 (2000); 29 U.S.C. § 52 (2000).

<sup>165</sup> Press Release, Department of Justice, Release of Letter from Thurman Arnold to Secretary of Central Labor Union of Indianapolis (Nov. 20, 1939).

<sup>166</sup> Letter from Thurman W. Arnold, New York Industrial Commissioner, to Arthur Krock, Journalist, *NY Times* (Feb. 27, 1958), in *VOLTAIRE AND THE COWBOY*, *supra* note 2, at 424.

<sup>167</sup> Arnold had such conflicts with Attorney General Murphy over his labor cases that he contemplated resigning and joining a New York law firm. See Letter from Thurman W. Arnold, Assistant Attorney General, to Robert H. Jackson, Attorney General, *supra* note 163, at 300.

earliest days as head of the Antitrust Division throughout the rest of his life.<sup>168</sup> He reflected later in his memoirs:

[W]hen a labor union utilized its collective power to destroy another union, or to prevent the introduction of modern labor-saving devices, or to require the employer to pay for useless and unnecessary labor, I believe[] that the [antitrust] exemption has been exceeded and that the union was operating in violation of the Sherman Act.<sup>169</sup>

Arnold's first labor prosecution was a criminal indictment against the carpenters' union and its president William Hutcheson for a jurisdictional strike against Anheuser-Busch over which union had the right to install machinery in the company's plant.<sup>170</sup> The Supreme Court held that the strike was legal and not an antitrust violation.<sup>171</sup> It struck down subsequent antitrust indictments against labor unions without comment other than citation to *Hutcheson*.<sup>172</sup> The Court also stopped Arnold from using the anti-racketeering laws to the same effect.<sup>173</sup>

The normally savvy and political astute Arnold was simply blind to the political danger in attacking a core element of the New Deal coalition. Some of his congressional testimony on his labor views was so inflammatory that Attorney General Biddle prohibited him from returning to Capitol Hill when subpoenaed to testify at a later hearing.<sup>174</sup> At one point, the general counsel of the American Federation of Labor called him "the greatest enemy of organized labor in America today."<sup>175</sup>

Even Arnold acknowledged that the labor cases were his "one conspicuous failure." What he could not understand was

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<sup>168</sup> See ARNOLD, *supra* note 52 at 240-59; ARNOLD, *supra* note 23, at 130; Arnold, *Labor's Hidden Holdup Men*, *supra* note 52, at 136-40; Letter from Thurman W. Arnold, New York Industrial Commissioner, to Arthur Krock, Journalist, NY Times, *supra* note 166, at 424; Letter from Thurman W. Arnold, Assistant Attorney General, to Arthur Sulzberger, Publisher, N.Y. Times (Jan. 25, 1940), in VOLTAIRE AND THE COWBOY, *supra* note 2, at 303.

<sup>169</sup> ARNOLD, *supra* note 23, at 116.

<sup>170</sup> United States v. Hutcheson, 32 F. Supp. 600 (E.D. Mo. 1940), *aff'd*, 312 U.S. 219 (1941).

<sup>171</sup> United States v. Hutcheson, 312 U.S. 219, 233 (1941).

<sup>172</sup> United States v. Int'l Hod Carriers, 313 U.S. 539 (1941) (per curiam).

<sup>173</sup> United States v. Local 807, Int'l Bhd. of Teamsters, 315 U.S. 521, 538-39 (1942).

<sup>174</sup> Arnold's original March 21, 1942 testimony was simply reprinted. Thurman Arnold, *Outlawing Labor Racketeering*, 22 CONG. DIG. 176, 176-78 (1943).

<sup>175</sup> PITT. PRESS, Apr. 28, 1940.

how he kept losing in the Supreme Court in increasingly brief and humiliating decisions or how these futile efforts were crippling his ability to continue an effective campaign of antitrust enforcement in other industries.

#### X. ANTITRUST AND THE WINDS OF WAR

Perhaps the gravest challenge Arnold faced as head of the Antitrust Division was the wholesale repeal or practical nullification of antitrust in the face of the war planning and production leading up to the United States entry into World War II. The planning process, such as it was, and the war effort itself threatened to derail antitrust enforcement as effectively as the NRA had done during his predecessors' tenure. As early as July 1940, Arnold saw the threat war preparation meant for antitrust.<sup>176</sup>

Arnold fought back both within the Administration and publicly by using antitrust laws to attack profiteering and other impediments to preparedness during the early days of the war in Europe before Pearl Harbor—linking the attack on international cartels to the defense needs of the nations, showing the links between the international cartels and the Nazi war machine, and arguing against the return of a cartelized economy in the postwar era.<sup>177</sup> In *Bottlenecks*, Arnold eloquently described how anticompetitive agreements were injuring the national defense by:

Throttling American capacity to produce essential war materials by foreign ownership and control of patents;

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<sup>176</sup> VOLTAIRE AND THE COWBOY, *supra* note 2, at 49.

<sup>177</sup> ARNOLD, *supra* note 52, at 15, 60–90; THURMAN W. ARNOLD, DEMOCRACY AND FREE ENTERPRISE (1942) [hereinafter ARNOLD, FREE ENTERPRISE]; Thurman W. Arnold, *Antitrust Activities of the Department of Justice*, 19 OR. L. REV. 22 (1939); Arnold, *Antitrust Law Enforcement*, *supra* note 52, at 7, 19; Arnold, *Feathers and Prices*, *supra* note 52, at 6; Thurman Arnold, *How Cartels Affect You*, AM. MERCURY 321, 329 (1943) [hereinafter Arnold, *How Cartels Affect You*]; Thurman W. Arnold, *The Role of the Bar in War*, 30 ILL. B.J. 409, 411 (1942); Arnold, *What Can Government Offer*, *supra* note 52, at 525; Letter from Thurman W. Arnold to Robert H. Jackson (May 18, 1940), in VOLTAIRE AND THE COWBOY, *supra* note 2, at 305; Thurman Arnold, *This War Will Save Private Enterprise*, SATURDAY EVENING POST, May 30, 1942, at 24; Thurman W. Arnold, *We Must Reform the Patent Law*, ATLANTIC MONTHLY, Sept. 1942, at 47; *Postwar Issue: State Controls or Competition, Why Thurman Arnold Believes Antitrust Prosecutions Necessary*, U.S. NEWS, Apr. 17, 1942, at 16; Arnold, *supra* note 151.

Cartelization of certain industries with price and production control in foreign hands;

Transmission to foreign companies of American military secrets;

Division of markets, fixing and restricting of price of materials essential to military preparation;

Collusive bidding on contracts for the Army and Navy.<sup>178</sup>

Arnold demonstrated how agreements between American and German firms in the optical industry had jeopardized war preparedness and how the very same firms had unsuccessfully tried to threaten the War Department with delays if the antitrust suit was not dropped.<sup>179</sup> In a nationwide radio address in 1942, Arnold cited to a list of 162 cartel agreements between the thoroughly Nazified I.G. Farben Company of Germany and various American firms.<sup>180</sup>

*United States v. Standard Oil Co.* was the notable success of this effort.<sup>181</sup> Standard Oil and I.G. Farben of Germany had agreed as early as 1929 to divide world markets, with I.G. Farben having exclusive rights to artificial rubber and Standard Oil controlling the world market for petroleum products. The companies exchanged technology with Fraben receiving a great deal of important Standard Oil work in the artificial rubber area and giving relatively little in return. One of the consequences of the deal was Standard Oil's inability to reenter the artificial rubber market without I.G. Farben's consent, a decision which had profound consequences for war preparedness in the United States.

Arnold had the law and facts on his side and was prepared to criminally indict the companies through the grand jury process. If the United States had not already been at war, this probably would have happened. Instead, Standard Oil was able to exert its influence with the War Department and Arnold was forced into accepting a consent decree which freed up some key patents, but required only the payment of a \$50,000 fine.<sup>182</sup>

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<sup>178</sup> ARNOLD, *supra* note 52, at 74.

<sup>179</sup> *Id.* at 70-71.

<sup>180</sup> Arnold, *supra* note 151.

<sup>181</sup> *United States v. Standard Oil Co.*, 1940-43 Trade Cas. (CCH) ¶ 56,198 (D.N.J. 1942), *amended by* 1940-43 Trade Cas. (CCH) ¶ 56, 269 (D.N.J. 1943).

<sup>182</sup> *Id.*

Arnold "leaked" the real story to the press and Congressional hearings which laid the record of the case before the public.<sup>183</sup> In a series of appearances before the Senate National Defense Committee, chaired by Truman and the Patent Committee chaired by Homer Bone, Arnold laid out what he had been prepared to prove in court.

As if the original cartel arrangement was not bad enough, the companies continued to try to keep their private deal together, despite the war. Even after World War II had begun in Europe, there was evidence that Standard Oil had agreed with I.G. Farben to continue to suppress production of artificial rubber in the United States, even though the arrangement was increasingly one-sided in favor of I.G. Farben and the wishes of the Hitler regime. Arnold believed Standard Oil attempted to keep its cartel going even during the war and linked the company to near espionage in giving German companies vital technological information.<sup>184</sup> Standard Oil limited its own development of artificial rubber and blocked its commercial development by others, leaving the United States short of this vital commodity while production flourished in Germany thanks to I.G. Farben's uncontested control of this commodity. Although Arnold was always careful to attribute the cartel agreements to the desire to dominate world markets rather than lack of patriotism, Senator Truman characterized Standard Oil's conduct as approaching treason.<sup>185</sup> Arnold demonstrated the existence of similar agreements between Farben and other American companies for magnesium, titanium, and other products that had similar effects and how the initial cartel agreements inevitably expanded to include other American and international firms until the agreements encompassed all worldwide competitors in truly global cartels to the detriment of American consumers and the war effort.<sup>186</sup>

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<sup>183</sup> Arnold vs. Standard Oil, *NEWSWEEK*, June 8, 1942, at 46, 46-48; I.F. Stone, *Thurman Arnold and the Railroads*, *NATION*, Mar. 6, 1943, at 331, 331.

<sup>184</sup> Arnold, *supra* note 151.

<sup>185</sup> See ARNOLD, *supra* note 23, at 145.

<sup>186</sup> *Hearing, Patents Part 2, supra* note 150, at 3-7 (statement of Thurman W. Arnold, Assistant Attorney General); *Investigation of the National Defense Program, Part 11: Rubber: Hearings Before the Special Senate Comm. Investigating the National Defense Program*, 77th Cong. (1942) (original and supplemental statements of Thurman W. Arnold, Assistant Attorney General on Mar. 26-27 and June 1 respectively).

Arnold himself was careful not to directly impugn the patriotism or loyalty of American companies as much as simply attribute these actions as a regrettable, but understandable, attitude of greed that could only be cured through more antitrust enforcement both during and after the coming victory against the Axis. For Arnold: "You cannot control prices unless you restrict production. You cannot restrict production without depriving a nation of wealth in peace, and of strength in war."<sup>187</sup>

Despite these revelations, Arnold was losing the antitrust battle to defense preparation and the war effort on a daily basis. The problem was that while the Standard Oils, DuPonts, GEs, and Alcoas were guilty of heinous conduct, their sins were ultimately greedy in nature rather than traitorous. These companies were absolutely vital to the war effort and many of their executives were now working in the war planning and production effort. Arnold was forced to agree publicly—if not entirely voluntarily—to defer to the War and Navy Departments in the event they explicitly found that any particular antitrust violation was necessary for national defense.<sup>188</sup> Perhaps it was inevitable that this would overwhelm his antitrust enforcement program given the scope of the national emergency and the corporatist culture of the war planners themselves. Case after case was vetoed by the planning and defense authorities, including cases involving conduct predating the war.<sup>189</sup> Arnold spent more and more of his time fighting with the war planners, including Hugh Johnson, who was the first head of the NRA and still had little use for the antitrust laws.<sup>190</sup> For the first time, Congress cut rather than increased Arnold's budget and staffing.

The final straw appeared to be Arnold's attempt to criminally prosecute the railroads for price fixing and to indict Averell Harriman, the chairman of the Union Pacific, who was

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<sup>187</sup> Arnold, *How Cartels Affect You*, *supra* note 177, at 326.

<sup>188</sup> ARNOLD, *supra* note 52, at 73.

<sup>189</sup> Letter from Thurman W. Arnold to Ms. C. Warriner (Apr. 28, 1942), in *VOLTAIRE AND THE COWBOY*, *supra* note 2, at 326 (discussing pressure by General Electric and other companies to use war needs to defer or derail antitrust investigations); Letter from Thurman W. Arnold to Robert H. Jackson (Sept. 9, 1942), in *VOLTAIRE AND THE COWBOY*, *supra* note 2, at 330. See generally Steuer & Barile, *supra* note 9.

<sup>190</sup> See Letter from Thurman W. Arnold, Assistant Attorney General, to Hugh Johnson, National Recovery Administration (Feb. 7, 1941), in *VOLTAIRE AND THE COWBOY*, *supra* note 2, at 310. See generally HAWLEY, *supra* note 6, at 53–106 (explaining Johnson's views on antitrust).

appointed as United States Ambassador to the Soviet Union in the same year that Arnold would have indicted him.<sup>191</sup> The indictment was quashed in the name of national defense and Arnold was effectively gone from the one job that he truly loved.<sup>192</sup>

Roosevelt offered Arnold a face-saving position on the federal appellate bench.<sup>193</sup> Arnold pretended he wanted it and Roosevelt pretended he was sorry to see him take it. Drew Pearson led a newspaper crusade to get Arnold to decline the appointment for the good of the country, but it is unlikely that Roosevelt would have kept him on in any event. Arnold himself quipped to a *Time* interviewer that he was like the Marx Brothers, funny at first, but something the public eventually grows tired of.

The conventional wisdom, even from friends—although philosophical opposites—like Rex Tugwell, was that Arnold's antitrust efforts, particularly in the defense area, were a short term stir that had to be smothered in order to promote the consolidation coordination and centralized management of the war effort. Arnold disagreed: "[E]ven during the war the symbol of the antitrust ideal was kept alive by the Department of Justice."<sup>194</sup> Arnold had the last laugh when antitrust actions revived after the war, including a vigorous prosecution of international cartels and the sham patent and trademarks licensing agreements designed to bolster those arrangements.<sup>195</sup> Moreover, the antitrust ideal spread to Germany, and to a lesser extent Japan, and led to the eventual creation of the European Economic Community which contained an antitrust system that eventually rivaled that of the United States.

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<sup>191</sup> Bits and pieces of the investigation of the railroads can be found in Corwin D. Edwards, *Thurman Arnold and the Antitrust Laws*, 58 POL. SCI. Q. 338, 349–53 (1943); I.F. Stone, *Thurman Arnold and the Railroads*, NATION, Mar. 6, 1943, at 331.

<sup>192</sup> Alan Brinkley, *The Antimonopoly Ideal & the Liberal State: The Case of Thurman Arnold*, 80 J. AM. HIST., 557, 578 (1993).

<sup>193</sup> See Spencer Weber Waller, *The Short Unhappy Judgeship of Thurman Arnold*, 3 WYO. L. REV. 233, 241–42 (2003).

<sup>194</sup> ARNOLD, *supra* note 23, at 145.

<sup>195</sup> 1 SPENCER WEBER WALLER, KINGMAN BREWSTER, JAMES R. ATWOOD & SPENCER WEBER WALLER'S ANTITRUST AND AMERICAN BUSINESS ABROAD § 2.12–.13 (3d ed. 1997 & SUPP. 6 2003); SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 9.03 (1992 & SUPP. 11 2003).



## XI. RELATIONSHIP TO LAW AND ECONOMICS

For all his populist rhetoric, it was Arnold who changed the age-old debate about the virtues and vices of size. For Arnold, size alone was no offense and might even be desirable, if, and only if, it were efficient and savings were passed along to consumers.<sup>196</sup> By linking antitrust to consumer interests, and in defining consumer interests as he did, Arnold set the stage for modern antitrust and the debates that continue today as to the meaning of harm to competition and how best to protect the interests of consumers.

Arnold introduced a symbiotic relationship between antitrust law and economics which still exists today, albeit in a very different form. By 1938, while few economists supported the mission of the Antitrust Division, prominent exceptions existed. Edward Chamberlin, Joan Robinson, and others had recently published groundbreaking work on monopolistic competition, justifying a more interventionist government antitrust policy against firms which collectively dominated their industry without either a classic monopoly or traditional overt collusion.<sup>197</sup> Antitrust finally had a set of theories that supported Arnold's mission to enforce the antitrust laws in order to break private restraints holding back production, unlock rigid administered prices, help restore consumption, and benefit consumers.

To fully implement this vision, economists as well as lawyers and investigators were needed. Walton Hamilton, a distinguished economist who had been Arnold's colleague on the Yale Law School faculty, and previously involved in the NRA as a representative of the public, soon joined Arnold at the Antitrust Division.<sup>198</sup> Arnold also recruited Corwin Edwards, another distinguished economist, to join the staff of the Division.

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<sup>196</sup> HAWLEY, *supra* note 6, at 428.

<sup>197</sup> See generally EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1933); JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 68-70 (1933); PERITZ, *supra* note 9, at 106-10; Horace G. White, Jr., *A Review of Monopolistic and Imperfect Competition Theories*, 26 AM. ECON. REV. 637 (1936).

<sup>198</sup> Hamilton had a distinguished academic career before joining Yale. See Malcolm Rutherford, *Walton Hamilton, Amherst, and the Brookings Graduate School*, WORKING PAPERS SERIES (Dep't of Econ., Univ. of Victoria, Discussion Papers) (Oct. 16, 2001), at <http://netec.wustl.edu/WoPEc/data/Papers/vicvicddp0104.html>. For Hamilton's NRA involvement see HAWLEY, *supra* note 6, at 95, 106-07.

One commentator has mistakenly suggested that Arnold sought the type of economic efficiency later pursued by the modern day law and economics movement.<sup>199</sup> Despite introducing economists into the warp and woof of the decision-making of the Antitrust Division,<sup>200</sup> Arnold can by no stretch of the imagination be considered an early forbearer of the contemporary law and economics movement. The law and economics movement today, often referred to as the Chicago School, regards markets as robust and largely self-correcting and antitrust enforcement outside of price fixing and particularly large horizontal mergers usually more harmful than simply allowing market forces to self-correct.<sup>201</sup> At most, Arnold shared the conviction that size alone should not be an offense against the antitrust laws.<sup>202</sup> In his unique style, Arnold claimed that preferring small economic units to big ones was like preferring low buildings to high ones or saying that "Milton is more poetical than the pig is fat."<sup>203</sup> As to the brand of economics practiced at the University of Chicago, Arnold thought it "fantastic nonsense."<sup>204</sup>

What Arnold meant by efficiency, however, is very different from the sole focus of the current emaciated form of antitrust on allocative efficiency and wealth maximization. At a minimum, Arnold believed that powerful organizations had to show that they were both efficient and serving the consumer in order to

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<sup>199</sup> Douglas Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period*, 23 STAN. L. REV. 1049, 1052, 1056, 1058 (1971).

<sup>200</sup> Economic thinking certainly has dominated the Antitrust Division and the FTC in recent years. Arnold laid the groundwork for the prominence of economics in antitrust over the years and has on some occasions supported aggressive antitrust enforcement, and at other times supported its retrenchment and virtual non-enforcement. See generally MARC ALLEN EISNER, *ANTITRUST AND THE TRIUMPH OF ECONOMICS* (1991); PERITZ, *supra* note 9; SUZANNE WEAVER, *DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION* (1977).

<sup>201</sup> See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 217-24, 280-82 (1993) (discussing the implications of horizontal mergers); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 40-42, 97-113 (1976); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933 (1979).

<sup>202</sup> ARNOLD, *supra* note 52, at 3-4, 122; Letter from Thurman W. Arnold to Alfred Friendly (Aug. 9, 1961), in *VOLTAIRE AND THE COWBOY*, *supra* note 2, at 439.

<sup>203</sup> Arnold, *Feathers and Prices*, *supra* note 52, at 5.

<sup>204</sup> Letter from Thurman Arnold to Clifford Hansen, (May 1, 1967) (on file with the American Heritage Center, University of Wyoming, Thurman Wesley Arnold Papers, 1891-1969).

escape antitrust scrutiny.<sup>205</sup> For Arnold, most economists and the law and economics movement of his day were the priests of the old order, preaching that the government was powerless to take action to solve the ills of the day, lest it contravene the natural laws of markets.<sup>206</sup> To him, the newer economics of his day were a source of action, not inaction. More importantly, "[a]ntitrust enforcement must come down from the blue sky of economic and legal theory and concern itself with these family budget items, one at a time."<sup>207</sup>

Inefficiency in the Great Depression meant an economy that produced much but could not distribute those goods and services to consumers.<sup>208</sup> Even where distribution worked reasonably well, consumers frequently lacked the purchasing power to buy the goods and services being produced. The failure of the Great Depression was "a dangerous kind of waste" that created the situation where those in need saw "the spectacle of goods withheld from them for no understandable reason."<sup>209</sup> Arnold described the basic economic problem as follows:

The great mass of our population sell their goods, and services, and labor in the competitive markets. They buy their necessities in a controlled market. Thus our economic structure consists of two separate worlds. The first is a world of organized industry and the second is a world of small unorganized business men, farmers, laborers and consumers. In the first world, there is the power to maintain high prices no matter how much the demand for the product falls off. The result is that production drops, men are laid off and this in turn lowers the purchasing power and makes the demand drop still further. In the second world, unlimited competition still exists and cannot be controlled. In this world live the farmers, retailers, and the small business men who supply the consumers with both goods and labor. Here, when the supply increases or the demand falls off, prices drop to the bottom, but the people go right on producing as much as the conditions of the market will permit. In the first world, we have concentrated control, which makes possible high and rigid

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<sup>205</sup> ARNOLD, *supra* note 52, at 116-31; Arnold, *Feathers and Prices*, *supra* note 52, at 6.

<sup>206</sup> ARNOLD, *supra* note 33, at 65-66, 135-39; ARNOLD, *supra* note 52, at 72-104.

<sup>207</sup> ARNOLD, *supra* note 52, at 123.

<sup>208</sup> Arnold, *Address at Banquet*, *supra* note 52, at 220-21.

<sup>209</sup> Arnold, *Feathers and Prices*, *supra* note 52, at 3.

prices, which in turn lead to restriction of production and wholesale discharge of labor. In the second world, we find competition, low flexible prices, large production and labor standards often at starvation levels.<sup>210</sup>

For Arnold, the Four Horsemen of the Apocalypse were "fixed prices, low turnover, restricted production, and monopoly control."<sup>211</sup> Antitrust for Arnold was a pragmatic tool to attempt to help the New Deal end the Great Depression, rather than any specific legal or economic agenda of his own. To his dying day, Arnold also believed in a variety of non-economic justifications for antitrust as part of the attack on concentrated economic power in a democracy that was both inefficient and destroyed local business and drained away local capital.<sup>212</sup> In 1955, Arnold wrote:

The most significant evil at which the antitrust laws are aimed is the evil of absentee ownership and industrial concentration that makes for such depressions. We were slow to learn after 1929 that great corporate organizations cannot continue to take money out of local communities without somebody putting it back.<sup>213</sup>

In his seventies, Arnold summarized his philosophy:

The purpose of the antitrust laws is to ensure freedom of business opportunity. They are not designed to protect small business from larger and efficient competitors. They are not designed to prevent the growth of nationwide business enterprises so long as that growth is a product of industrial efficiency. Even if, through greater efficiency in operation and distribution, a corporation achieved a monopoly, that in itself would not violate the Sherman Act. But this has never yet happened. Monopolies have been built up by using financial strength to buy out competitors or force them out of business. It is this sort of growth and only this sort that the antitrust laws are designed to penalize . . . . This process repeated in industry after industry during the period between the first World War and the depression created a system of absentee ownership of local industries which made industrial colonies

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<sup>210</sup> Arnold, *Antitrust Law Enforcement*, *supra* note 52, at 5–6.

<sup>211</sup> ARNOLD, *FREE ENTERPRISE*, *supra* note 177, at 17.

<sup>212</sup> See ARNOLD, *supra* note 23, at 129; ARNOLD, *FREE ENTERPRISE*, *supra* note 177, at 37; Letter from Thurman W. Arnold to Alfred Friendly, *supra* note 202, at 439.

<sup>213</sup> Thurman Arnold, *The Economic Purpose of Antitrust Laws*, 26 MISS. L.J. 207, 208 (1955).

out the West and South, prevented the accumulation of local capital and siphoned the consumers' dollars to a few industrial centers like New York and Chicago.<sup>214</sup>

The Yale professor, New Dealer, and elder statesmen of the Washington bar always remembered watching the economic vitality drain away from Laramie, Wyoming and what it felt like to be an economic colony of distant corporations without control of your destiny. Such a perspective is simply incompatible with the basic precepts of the law and economics movement, although ironically it was Arnold who laid the seeds for the rise of the economist within the antitrust enforcement agencies.

## XII. ANTITRUST'S DEBT TO THURMAN ARNOLD

When he left the Justice Department, Arnold was, and still remains, the longest serving head of the Antitrust Division in history. Even today, Arnold enjoys a special status among those who followed him at the Justice Department, regardless of party politics or personal philosophies about antitrust. The former Attorney General Janet Reno reflected that during her childhood Arnold's name "was always synonymous with what the New Deal meant."<sup>215</sup> John Shenefield, head of the Division under President Carter, notes that "[h]is photograph looked down on us in the [f]ront [o]ffice so it was as though he was sitting there at your elbow, evaluating your performance" and that in making decisions the question was inevitably, "what would Thurman Arnold have done?"<sup>216</sup> James Rill, head of the Antitrust Division under the first President Bush, describes Arnold as one of the two Assistant Attorney Generals "head and shoulders" above the rest.<sup>217</sup> Anne Bingaman who served as President Clinton's first head of the Division described Arnold, by saying,

[He] created the modern Antitrust Division. His vigorous enforcement of the antitrust laws and his constant proselytizing of the benefits of competition raised the profile of the Division and convinced the American public of the benefits

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<sup>214</sup> Letter from Thurman W. Arnold to Alfred Friendly, *supra* note 202, at 439.

<sup>215</sup> Symposium, *supra* note 17, at 831.

<sup>216</sup> E-mail from John Shenefield, Partner, Morgan, Lewis & Bockius, to Spencer Weber Waller (Sept. 30, 2003) (on file with author); E-Mail from John Shenefield, Partner, Morgan, Lewis & Bockius to Spencer Weber Waller (June 10, 2003) (on file with author).

<sup>217</sup> E-mail from James R. Rill, Partner, Howrey, Simon, Arnold & White, to Spencer Weber Waller (Dec. 11, 2003) (on file with author).

of our nation's antitrust laws. The debt of the American public to Thurman Arnold cannot be overstated.<sup>218</sup>

Bingaman and the others are correct. Without Thurman Arnold, there would be no modern antitrust law or government antitrust enforcement. Just as the Supreme Court destroyed the legal underpinning for the corporate collectivism underlying the NRA Codes, Arnold destroyed the moral and economic basis for the culture of cartels in America and abroad. He upped the criminal and civil consequences for such business behavior, forced it underground, de-legitimized it by making it both anti-consumer and un-American, created a stable mandate for antitrust as part of an expanded role of the federal government in policing a healthy national economy, and made it impossible for antitrust to be repealed in the future or completely undermined by changes in the prevailing political winds.

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<sup>218</sup> E-mail from Anne Bingaman, Chairman, Valor Telecommunications, LLC, to Spencer Weber Waller (Oct. 1, 2003) (on file with author).

